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A HISTORY

OF

MILITARY GOVERNMENT

IN NEWLY ACQUIRED

TERRITORY OF THE UNITED STATES

BY

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PREFACE

When the Constitution of the United States was drafted and adopted no specific provision was made for expansion. In consequence of this, some have doubted whether we had the power to acquire new territory, and especially to incorporate it with the old. In spite of this, however, we have acquired a domain much larger than that comprised within the boundaries of the original thirteen States. The government of such territory before its incorporation has presented some interesting problems.

The framers of the Constitution probably thought that they had subordinated the military to the civil power in almost all cases, but a century has seen a remarkable growth in the scope of the former. It would be absurd to think of a civil power in hostile territory superior to the military power occupying the country; but upon the transfer of sovereignty the territory ceases to be hostile, unless a serious insurrection is raised, yet the military continues to administer affairs until Congress provides some form of government. Even in territory acquired by treaties of purchase in times of peace the military, or at least the Executive prerogative, which is generally based upon military authority, has played a more or less important part until such action by Congress. For that reason the governments of Louisiana and Florida in the transition stage have been included in this study, though there may be some doubt as to whether they were strictly military. At any rate they were so regarded by some at the time, and perhaps they were more military than civil.

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The legal status of new territory, and the legal basis for military government and its various administrative activities, must receive much attention in this book, but those topics are not all that is included in the purpose of the work. It is designed to present also an account of the actual management of new acquisitions from the time of occupation until the organization of territorial or state governments. As to Louisiana, Florida, New Mexico, and California, this plan involves practically a political history of those regions during that period. In the case of Texas, there was no transition stage, strictly speaking. In the case of Alaska, Hawaii, Porto Rico, the Philippines, and Samoa it has seemed unnecessary, not to say improper, to go into details upon the same scale. The treatment accorded to them is intended to show the development in military government since the Mexican War, or its application under modern conditions; also to show how the constitutional questions involved were met, that the reader may compare recent action in this matter with earlier cases. What has been the character of these later governments, what they have accomplished for good or evil, is left, for the most part, to the reader's memory of partisan accounts, or to the researches of a later historian, when the air shall have cleared and the evidence shall be complete and accessible. Cuba is not included because not yet a part of the United States, though she has felt the arm of our military power.

Despite the fact that military government is coming to be circumscribed more and more by rules and regulations, the prejudice against it seems to be as strong to-day as ever. This is true not only in the South, where the military governments are remembered chiefly for the evil they wrought, but throughout the country in general. The author is unconscious of having started out with any preconceived notions or prejudices one way or the other regarding the subject here treated. He has endeavored to set forth in their proper relations the facts as found, that they might tell their own story. What has been the character of military governments over occupied hostile territory and over new cessions, except our latest, he hopes the reader may be able to gather from a perusal of the following pages.

In making acknowledgments, the author cannot fail to mention Professor Frederick W. Moore, Ph. D., of the Vanderbilt University, who first suggested this field as a good one for investigation. The Hon. M. A. Otero, Governor of New Mexico, and the Hon. L. B. Prince, President of the New Mexican Historical Society, have been very courteous in answering letters of inquiry. The officials of the War and Treasury Departments at Washington also, especially the Hon. Charles E. Magoon, of the Bureau of Insular Affairs, have been very kind in supplying information by letter and through their official publications. Professor J. B. Moore, LL. D., of Columbia University, has piloted the author past several rocky shoals in the sea of international law, and has rendered invaluable assistance in seeing the book through the press. But thanks are due first of all to Professor Wm. A. Dunning, Ph. D., of Columbia University, who has taken an interest in the book from its inception, has read the manuscript, and has made many valuable suggestions. To him also, as well as to Dr. Alvin S. Johnson, of Columbia University, the author is indebted for assistance in reading the proof.

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INTRODUCTION

THE United States have acquired new territory in several different ways: by treaties of purchase, by conquest followed by treaties of cession, and by occupation and partition. In practically all important acquisitions of territory, except in the case of Texas and Hawaii, there was a transition stage, during which the new territory was held and governed in a manner not expressly provided for in the Constitution. In most cases the transition stage has ended in some form of territorial government; in one case it ended in a state government. During the transition stage the new territory was held under what is commonly called military government. This fact necessitates at the very beginning of this study an examination of what is meant by military government.

Chief Justice Chase has attempted to define three kinds of military jurisprudence: military law, military government, and martial law proper. The first consists of the rules and articles of war as used for the regulation of armies in the field. His definitions of the other two are almost too vague for formulation, but he makes the second apply to occupied hostile territory, the third to domestic territory in time of invasion or special danger.[1]

It is only within the last century that the distinction between military law and martial law has been clearly drawn in England and America. The difference has been well stated by Chief Justice Chase, and it is hardly necessary to add anything here to what he has said on the subject. But the vagueness of his distinction between military government and what he styles martial law proper renders doubtful the propriety of his divisions. Indeed, it can be shown that what the learned judge has endeavored to set off into two distinct classes are but different manifestations of one and the same thing. With military law we shall have no further concern.

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[1] Dissenting opinion, *Ex parte* Milligan, 4 Wall., 141 *et seq.*

Neither the Constitution nor the statutes of the United States give us much help in the definition of martial law, for it is not mentioned in either, at least in a definitive way. "According to every definition of martial law," said Attorney-General Cushing, "it suspends, for the time being, all the laws of the land, and substitutes in their place no law—that is, the mere will of the commander."[1] Such was the old view, probably based on a similar statement by the Duke of Wellington. Such is practically the view to-day also; but of late there has been a tendency to move away from the bald statement that martial law is the mere will of the military commander, and to justify it by "the common law of acts done by necessity for the defense of the commonwealth where there is war within the realm."[2] Martial law is the basis of military government, and necessarily applies in occupied hostile or foreign territory. It may be applied to domestic territory under certain conditions, but its application in the one case differs materially from that in the other. The latest authoritative declaration of what is allowable in the former may be found in the second convention of the Hague Conference, where it is said that "the occupant shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[1]

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[1] Opinions of Attorneys-General (Cushing), viii, 374.

[2] Pollock in *London Times*, March 10, 1902.

This simply means that the machinery of government falls into the hands of the military occupant, who may permit it to continue in operation, or alter it, or abolish it altogether. If the local laws remain and the native officials continue in office, it is only by his direction, or on sufferance. It is true that only extreme necessity, the welfare and safety of the army of occupation, will justify violent changes, but the occupant is practically the judge of the necessity. In any case, the responsibility for the management of the government devolves upon the commanding general. The last century has seen a decided tendency to limit his powers, and this has found expression in the quotation from the Hague Convention. While he is still left rather free under the law of necessity, he must be able to substantiate the necessity under the laws of nations. The course of this study will show that measures have been taken by military occupants within the last century which could not be justified under this rule. In addition to these limitations, the general may be, but commonly is not, limited by special laws enacted by the legislature of the country to which his army belongs. Such a system we call military government. After the acquisition of conquered territory, the military government continues *de facto* until altered by the new sovereignty.

The nearest approach which the Constitution makes to a mention of martial law is in that clause which authorizes the suspension of the privilege of the writ of *habeas corpus* when in cases of rebellion or invasion the public safety may require it. Such a suspension does not bring about a complete state of martial law. On the other hand, the proclamation of martial law suspends the writ, whether any mention is made of the suspension or not; for the will of the commander can never be supreme so long as the writ may be used against him. These facts might produce some doubts as to whether it was intended that martial law should ever be proclaimed on domestic territory. When any part of the country has, by insurrection or rebellion, defied and thrown off the home government, such region is, for the time being, no longer domestic territory, but has, to all intents and purposes, become hostile or foreign. The enforcement of martial law over such a district, when conquered, until the civil power can be re-established, cannot be questioned. But martial law is often proclaimed over territory confessedly domestic. Such must inevitably be the case where an insurrection covers the entire area of a state. In this instance the proclamation is but the announcement that the civil authorities are insufficient to cope with the disorders, and must be supported by the military. Again, martial law has been proclaimed in territory not in insurrection at all, but threatened by foreign invasion, as at New Orleans by General Jackson. Finally it has been enforced, at least certain features of it, where there was neither insurrection nor danger of invasion, as in the Northern States during the Civil War, and in the Southern States long after the insurrection was declared at an end. In all these cases the ostensible purpose was to uphold the *de jure* government.

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[1] Article xliii. Holls, *The Peace Conference at The Hague*, 447. A more elaborate statement may be found in the "Instructions for the Government of the United States Armies in the Field," issued April 24, 1863. Offic. Rec. (Reb.), Serial no. 124, pp. 148 *et seq.*

And herein lies the distinction between military government and martial law on domestic territory. The former supplants the existing government, whether it be *de jure* or *de facto;* the latter professedly supports the *de jure* government. In giving this support the military commander rises superior to the laws of ordinary times. He may arrest and detain individuals not connected with his army, and even punish them; he may interfere with the established courts; he has even gone so far as to disperse a state legislature; but he does not formally assume the management of civil affairs. These go on as before, except in the particular cases in which he interferes. But his will is supreme wherever he sees fit to make it so. Such a condition in France is known as the "state of war," and is recognized in the French law.[1] That it has no distinctive name in American and English jurisprudence is the fault of our nomenclature—or of our jurists.

While recognizing the fact that, in England and America, martial law on domestic territory is, and can be, regulated by no constitutional or statutory law, commentators say that it must be exercised with due moderation and justice, in accordance with the "paramount necessity" which alone calls it into being, and with the general rules of public law as applied to the state of war. It cannot, therefore, they say, be despotically or arbitrarily exercised any more than any other belligerent right; and in case of abuses redress may be had in civil courts, or by impeachment, after the restoration of the civil law.[2] It is spoken of as the "dominant military rule exercised under ultimate military and civil responsibility."

That there is some possibility of redress is evidenced by the fact that the legislatures of the United States and

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[1] The three conditions are: État de paix, état de guerre, et état de siège. Block, *Dictionnaire de l'Administration Française* (1898), pp. 1109 *et seq.*

[2] Halleck, *International Law* (London, 1893), ii, 544; Birkhimer, *Mil. Govt. and Mar. Law,* 338.

Great Britain have passed bills of indemnity, after the exercise of martial law, in order to protect officers from prosecution for acts done by virtue of their extraordinary powers. Though generally very sweeping in its terms, this indemnity legislation has not always been construed by the courts to cover every conceivable act. In a few cases subordinates have had to suffer for unwarranted acts, in spite of bills of indemnity.[1]

But all this qualification of the commander's power depends upon the return of the previously existing civil conditions. Happily such has always been the case in England and the United States, but, theoretically at least, the fact remains that the military commander, in the United States, the President, can rise superior to all laws, except possibly the law of humanity. Unusual cruelty might provoke foreign intervention. If he is the judge of the necessity of proclaiming martial law, he is likewise the judge of the time for withdrawing it. During the reign of martial law he might think that the public safety—or his own subsequently—required the abolition of the old system and the installation of himself as a king or a permanent dictator. In that event his work could be undone only by a counter revolution. In practice the commander usually is guided by motives based on the highest patriotism, but a bad man might be restrained only by fear, or by the extent of the obedience he could command in his army.

Such are the distinctions between military government and martial law on domestic territory. With the latter we shall not be much concerned in this study, though it may be necessary to notice it now and then.

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[1] *N. Y. World*, Oct. 5, 1865; *Appleton's Ann. Cyc. 1863*, p. 487 *et seq.*

BOOK I

LOUISIANA AND FLORIDA IN TRANSITION

CHAPTER I

LOUISIANA

I. TAKING POSSESSION

BY the treaty of San Ildefonso, concluded October 1, 1800, Spain agreed to retrocede the province of Louisiana, which had been given to her by the secret convention of 1762, to the French Republic. In 1803 Napoleon agreed, in consideration of fifteen million dollars, to cede the province, not yet in the possession of France, to the United States. The treaty of cession was concluded April 30, and proclaimed October 21, 1803. The third article of the treaty stipulated that the inhabitants of the ceded territory should be incorporated into the Union and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and that in the meantime they should be maintained and protected in the free enjoyment of their liberty, property, and the religion which they professed. The seventh article granted, for twelve years, to the ships of France and Spain such privileges as were accorded to those of the United States in all ports of Louisiana. Possession was to be given and evacuation effected as soon as possible.[1]

In his message[2] transmitting the treaty to the Senate, President Jefferson said: "With the wisdom of Congress it will rest to take those measures which may be necessary for the immediate occupation and temporary government of the country." In response to this suggestion, a bill of two sections was passed and became a law October 31. The first section authorized the President to employ the army and navy, and so much of the militia as he might deem necessary, to effect occupation and to maintain the authority of the United States in the new territory. The necessary funds were appropriated, to be applied under the President's direction. The second section read:

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[1] *Treaties and Conventions* (*U. S.*), 276 *et seq.*

[2] October 17, 1803.

> Until the expiration of the present session of Congress or unless provision be sooner made for the temporary government of the said territories, all the military, civil and judicial powers exercised by the officers of the existing government of the same, shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the full enjoyment of their liberty, property and religion.

February 24, 1804, an act was passed, to take effect in thirty days, extending to Louisiana several laws of the United States, among them those relating to revenue and coinage. March 26, the President approved an act dividing the territory and creating a territorial government for the lower portion, to take effect October 1, 1804. Until that time the powers conferred in the first act mentioned above were to be exercised by the Executive. A law provided funds to meet the expenses of this temporary government.

Mr. W. C. C. Claiborne, then governor of the Mississippi Territory, and General Wilkinson, of the army, were commissioned to take possession of Louisiana for the United States. As opposition was apprehended, they were authorized to use force, and the army and militia were ordered to be in readiness to move. However, no opposition was encountered, and the formal transfer of sovereignty was effected at the Cabildo, with some attempt at *éclat,* on December 20, 1803. Our commissioners reported that the American flag was raised in New Orleans "amidst the acclamations of the inhabitants." [1]

The same day Governor Claiborne issued a proclamation, reciting that the President had commissioned him to exercise the powers of government in Louisiana to the extent and purpose for which they were conferred in the act quoted above. All laws and municipal regulations then in force would be continued; all civil officers, except those whose duties were vested in him, and the collectors of the revenue, would continue in office during the pleasure of the governor. The inhabitants were exhorted to show true allegiance to the United States and obedience to their laws and authorities, and were assured of protection from violence from within and without. In a separate address to the citizens of Louisiana he promised them protection, and exhorted them to seek political information, to guide the rising generation in the paths of republican virtue and economy, without which their descendants could not know the true worth of the government transmitted to them.[2]

II. Social and Political Condition of Louisiana

The geographical limits of the Louisiana Territory were but vaguely defined in all the treaties of cession and retrocession, but the extent of the country actually acquired by the United States in 1803, as finally defined in the Spanish treaty of 1819, is familiar to all students of American history, and may be seen at a glance by reference to historical maps. As soon as it was known that the treaty of cession had been concluded, Mr. Jefferson sought detailed information respecting the territory. This information had not been obtained when the act of October 31 was passed, but it was secured before possession was effected.

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[1] Ann. 8 Cong., 2 Sess., 1230.

[2] *Ibid.*, 1232 *et seq.*

The population in 1803, according to a statement made up from the latest documents obtainable, amounted to 41,275, of whom about 16,000 were slaves and 1,303 free people of color. The census of New Orleans in 1803 gave it a population of 8,056. But these figures were believed to be too low. The Spanish governor was fully persuaded that the entire population of Louisiana was considerably in excess of 50,000. Upper Louisiana, included in the above figures, with settlements from St. Louis to New Madrid, contained 6,028 souls, of whom 883 were slaves and 197 free negroes. Figures for about 16,000 Indians were given, but their real number was unknown.

The white inhabitants were chiefly descended from the French and Canadians. There were a few German settlements, and a considerable number of English and Americans resided at New Orleans. In the Baton Rouge district, east of the Mississippi river, the Americans were greatly in the majority; in Upper Louisiana they were believed to constitute at least two-fifths of the whole. There were no colleges in the country. New Orleans had one public school, and a few private schools for children. Not more than half the [white?] inhabitants were supposed to be able to read and write, of whom, perhaps, not more than two hundred could do it well. They were said not to be litigious, and crimes of great atrocity were rare. In religion they were Catholics.

The chief industry was agriculture, but some manufacturing was carried on. The trade of the country was considerable. Of two hundred and sixty-eight vessels which entered the Mississippi in 1802, one hundred and seventy were American, ninety-seven Spanish, and only one French.

The imports from the United States had declined about half since 1799, but the exports to the United States had increased in the same ratio.

The province had been so long in the hands of Spain that all the French regulations had disappeared, and the machinery of government had become entirely Spanish, administering Spanish laws and ordinances made expressly for the colony. The French held actual possession in 1803 only about three weeks, and this possession was taken merely to effect the formal transfer to the United States. But in that brief time the prefect issued several decrees relating to the political organization. One of these declared the code given to the province by Louis XV. to be in force, excepting such parts as were inconsistent with the Constitution and laws of the United States. His authority to do this might very reasonably be questioned. One change was actually effected by the appointment of a mayor and council for New Orleans. The chief object of these changes was confessed by the French prefect to be to add some dignity and respectability to his position by a show of authority, and so to 'prevent his taking possession from being a ridiculous farce.[1]

The governor was at the head of the military and judicial departments, and was vested with some legislative powers. He could not levy new taxes without the consent of the inhabitants, but how that consent was secured is not stated. Presumably it was through the Cabildo, or Provincial Council, over which the governor presided. This body was composed of twelve members, said to be of the most wealthy and respectable, who secured their offices by purchase. The intendant, who looked after matters pertaining to the revenue, admiralty, and the granting of land, was entirely independent of the governor. The lieutenant-governor superintended the administration of Upper Louisiana, in which he was practically supreme in everything, except that his decisions were subject to appeal. The several districts were placed in charge of commandants, generally military men, who were supposed to look after almost everything of which a government takes cognizance. The procurer-general had, among other things, to indicate the punishment provided by law for any particular crime. Besides these, there were numerous other officers not necessary to mention, all of whom, except those whose salaries were less than thirty dollars per month, were appointed by the king. Not a single officer was chosen by the people.

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[1] Martin, *Hist. La.*, ii, 197; Gayarré, *Hist. La.*, ii, 606 *et seq.*

Nearly every officer—the governor, intendant, commandants, alcaldes, and others—had some sort of judicial power. In civil cases, small suits were decided in a summary way by the auditor or judge, after hearing both parties in *viva voce* testimony. In more important suits the litigants reduced their testimony to writing, all of which was taken before the keeper of the records of the court. They then had opportunities of making remarks upon the evidence, by way of petition, and of bringing forward opposing proofs. When the auditor thought the cause mature he issued his decree. Appeals were allowed, in some cases to Havana. The proceedings in criminal cases were very similar. Trials were not public, but the accused had every kind of privilege in making his defense, the testimony being written. Trial by jury was unknown. Fees were small.

Such was the judicial system in theory. In practice it was said to be very corrupt. Important suits were rendered expensive by delays. Appeals to Cuba and Madrid were slow and ruinous. The favors of the officials, from the governor to the constable, were subject to purchase.[1]

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[1] Gayarré, *ibid.*, 584.

The Catholic Church was a part of the government. Its officials also had certain judicial powers. Some of them were paid from the public treasury.

The expenses of the government, including the pay and support of the troops garrisoning the country, and other items, such as repair of forts and public buildings, salaries, and Indian presents, were far in excess of the revenue. The chief source of income was the six per cent. tariff on all imports and exports, yielding about $120,000 annually. There were a few taxes, for example, on inheritances and legacies, salaries of civil officials, saloons, conveyances of real estate, and there were fees for pilotage, but all these did not yield more than five or six thousand dollars annually. Instead of paying local taxes, each inhabitant was bound to make and repair roads, bridges, and embankments through his own estate. A part of the deficit was met by the importation of about $400,000 in specie from Vera Cruz, but there was still a yearly deficit of about $150,000. At the time of the transfer it had amounted to $450,000. To meet this, certificates, called *liberanzas,* were issued, bearing no interest. They usually passed at a discount of from twenty-five to fifty per cent. This deficit, it was declared, was largely due to the criminal negligence of the officials, who openly countenanced smuggling. The income from the six per cent. duties alone should have produced $279,480, as the imports and exports amounted to $4,658,000.[1]

About the best way to characterize such a government is to say that it was "Spanish colonial." It was spoken of by some historians of Louisiana as more military than civil.

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[1] The material for this section has been taken almost wholly from reports prepared for President Jefferson and submitted by him to Congress. They may be found in Ann., 8 Cong., 2 Sess., 1498 *et seq.* A few statements have been taken from Martin, Gayarré, and from Stoddard, *Hist. Sketches of La.*

III. CONSTITUTIONAL BASIS OF THE NEW GOVERNMENT

When the Louisiana Territory was acquired our Government was in the absolute control of the ultra-constitutional, or strict constructionist party. Their efforts to find a constitutional justification for everything connected with the transfer are interesting, not to say amusing, in view of the fact that they ultimately had to do several things for which there was no direct warrant in the Constitution, but which were not, for that reason, necessarily unconstitutional. Whether any act really did transgress the fundamental law will come up later. The situation seemed to some of the men who had to deal with it somewhat anomalous, the newly acquired country being considered neither entirely domestic, nor yet wholly foreign. This was the view of Mr. Jefferson, who drafted an amendment beginning: "Louisiana, as ceded by France to the United States, is made a part of the United States."[1] However, the domestic theory so far prevailed as to obviate the necessity of an amendment, but some of the measures adopted to carry it out savored somewhat of the opposite theory.

When the act of October 31[2] came up in the House, Mr. Roger Griswold, of Connecticut, seconded by Mr. Elliott, of Vermont, moved to strike out the second section. The objection brought out by these gentlemen, and those who sided with them, was that the bill proposed to confer on the President all the powers, military, civil, and judicial, then exercised by the existing government in Louisiana. Just what those powers were nobody knew, but they certainly were legislative, executive, and judicial. The union of the three departments of government in one man was repugnant to the Constitution. Nor could the legislature delegate its powers of legislation to the President. Even if allowable, such a delegation of powers was bad policy. While it was not apprehended that the President would abuse them, it would be possible for him, under cover of this authority, to establish the whole code of Spanish laws, however repugnant to our own, and become practically a despot. If such a despotism was necessary, as some argued, let the military power be exercised by the President as commander-in-chief of the army.[1]

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[1] *Writings* (Ford), viii, 241. See also p. 262.

[2] *Supra*, p. 24.

Those favoring the bill argued that the extent of powers proposed to be conferred arose from necessity, it being feared that turbulent spirits might resist the transfer of sovereignty. Such a delegation was objectionable on general principles, though not unconstitutional, but this was an exceptional case, and the powers were not to be parted with for a long time. Had we acquired the territory by war, would any one say that we could not have driven out the Spanish government and appointed officers to administer the laws? When a territory was ceded its inhabitants had, according to the law of nations, a right to all the existing laws until they were amended by the new sovereignty. The entire government of Spain would cease the moment we took possession. Should the people be abandoned to anarchy?[1]

This argument from expediency and necessity could be supported by appeal to precedent. So far as the act delegated and united powers, it followed the Ordinance of 1787. There was in this no delegation or union of the powers of the general government. Indeed, no executive or judicial powers appear to belong to Congress as a national legislature, consequently it had none to delegate. The delegation and union, then, was the act of Congress as a sovereign,—a constitutional sovereign, it is true, but a sovereign in whom inhered all the powers of government so far as they related to territory, in virtue of being empowered to make all needful rules and regulations for the same, and a sovereign who might even govern directly.

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[1] *Ann.*, 8 Cong., 1 Sess., 499 *et seq.*

It has already been stated that the powers of government were vested in the President. They were drawn from two sources. Since he was authorized to use the army and navy in effecting and maintaining possession, he could, in case of necessity, have governed as a military commander. The other source was found in the powers exercised by the existing government, which were conferred on the President. Mr. Jefferson's opinion of these powers may be gathered from some of his letters and official acts. The first quotation is from a letter to Albert Gallatin, Secretary of the Treasury, dated November 9, 1803. After enumerating several things for which Congress should make provision, such as the administration of justice, the naturalization of ships and the prohibition of the importation of slaves from abroad, he continues:

> Without looking at the old territorial ordinance, I had imagined it best to found a government for the territory or territories of *lower* Louisiana on that basis. But on examining it, I find that it will not do at all; that it would turn all their laws topsy turvy. Still I believe it best to appoint a governor and three judges, with legislative powers; only providing that the judges shall form the laws, and the governor have a negative only, subject further to the negative of a national legislature. The existing laws of the country being now in force, the new legislature will of course introduce the trial by jury in *criminal* cases, first; the habeas corpus, the freedom of the press, freedom of religion &c., as soon as can be, and in general draw their laws and organization to the mould of ours by degrees as they find practicable without exciting

too much discontent. In proportion as we find the people there riper for receiving these first principles of freedom, Congress may from session to session confirm their enjoyment of them.[1]

To Mr. Madison, Secretary of State, under date of July 14, 1804:

The third article provides that they shall continue under the protection of the treaty, until the principles of our constitution can be extended to them, when the protection of the treaty is to cease, and that of our own principles to take it's place. But as this could not be done at once, it has been provided to be as soon as our rules will admit. Accordingly Congress has begun by extending about 20 particular laws by their titles, to Louisiana.[2]

October 31, 1803, Secretary Gallatin wrote to W. C. C. Claiborne, who was that day commissioned governor of Louisiana:

It is understood that the existing duties on imports and exports, which by the Spanish laws are now levied within the province, will continue until Congress shall have otherwise provided.[3]

November 14, he issued instructions to H. R. Trist, collector at Fort Adams, and designated collector at the port of New Orleans, to execute the Spanish customs laws, mentioning specifically export duties, and the collection of duties to and from the Mississippi district and New Orleans.[4]

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[1] *Writings of Jefferson* (Ford), viii, 275.

[2] *Ibid.*, 313.

[3] *Writings of Gallatin* (Adams), i, 167.

[4] Book "G," Jan. 1, 1803 to Dec. 31, 1808, Collectors Small Ports, in Office Secretary of Treasury. Quoted in Attorney-General Griggs's *Brief* (October, 1900), 82.

In the course of the debates in Congress the maxim of international law, that the inhabitants of ceded territory are entitled to all the existing laws until they are amended by the new sovereignty, was quoted by one of the speakers. He probably meant to exclude such laws as are political in character. At a later date the Supreme Court affirmed that the political laws necessarily changed, though the municipal laws remained.[1] Accepting this principle, it is hard to find any justification for the adoption of the Spanish customs laws.

The course adopted by the Executive was indirectly approved by Congress in the act of February 24, 1804, which purported to extend our revenue laws to the recently acquired territory, the same to take effect in thirty days. The logical inference is that, in the opinion of Congress, these laws did not apply to Louisiana before that date. That they extended there the moment the territory came into our possession does not seem to have occurred to anybody. Yet there were in the Senate, and voting with the administration, Jonathan Dayton, Pierce Butler, and Abraham Baldwin, all of whom had sat in the Constitutional Convention. And Mr. Madison, one of the most conspicuous members of that body, was Secretary of State.

The apparent reason why the Spanish revenue laws were enforced is that they were believed to remain operative until altered by the new sovereignty. Such a view appears untenable; for those laws certainly were political in character. A new sovereign might possibly adopt the political laws of the old, but it is assumed that he already has laws defining his relation to his subjects, and that these at once operate over new subjects when no other stipulation is made. The sovereignty of the United States had already adopted such laws, applicable to all subjects, and these necessarily applied to the people of Louisiana, subject only to the modifications to which the sovereignty had assented in the treaty of cession. Not only did the President have no authority to enforce the Spanish customs laws, but he was in duty bound to enforce our own. Not even necessity can be appealed to in justification of what was done. The fact that New Orleans was not within a collection district did not prevent the execution of some revenue laws, and that, too, by civil officials; then why not the revenue laws of the United States?

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[1] Amer. Ins. Co. *vs.* Canter, 1 Peters, 511.

The seventh article of the treaty, granting special privileges to French and Spanish ships in Louisiana ports for twelve years, does not appear to have been extensively discussed at the time, but a similar provision in the treaty of Paris (1898) has been assailed as violating that clause of the Constitution which requires that duties, imposts, and excises be uniform throughout the United States. From some diplomatic correspondence of later years we learn that the constitutionality of the seventh article was considered by the Senate. In a communication of March 29, 1821, John Quincy Adams says to the French minister, de Neuville, that whether Article VII was compatible with the Constitution or with Article III "might be, and was, a question to the Senate in deliberating upon the treaty. It was a question of construction upon a clause of the Constitution; and that construction prevailed with which the terms of the treaty were reconcilable to it and to themselves." At this point the Secretary of State is forced to admit that, after the admission of Louisiana as a State before the end of the twelve years, the continued observance of Article VII was an open violation of the Constitution, to which objections might have been raised, but adds that the States waived such objections and admitted the inhabitants of Louisiana "to all the rights of American citizens, a friendly grant in advance of that which, in the lapse of three short years, might have been claimed as an undeniable right."[1]

Something has already been said concerning the character of the local government in Louisiana prior to the acquisition by the United States. In the opinion of Laussat, the Spanish governor might have used the words frequently, but erroneously, ascribed to Louis XIV., "*L'état, c'est moi.*" This was a somewhat exaggerated view, but it must be confessed that there was much in the political system of Louisiana not in harmony with republican ideals. Mr. Jefferson's opinion of the fitness of the people of Louisiana for self-government was expressed in a letter to De Witt Clinton, December 2, 1803: "Although it is acknowledged that our new fellow-citizens are as yet as incapable of government as children, yet some cannot bring themselves to suspend its principles for a single moment."[2] Still it is hard to believe that Jefferson thought they could be governed without reference to the most sacred guarantees of the Constitution. But what else were he and his governor-general and intendant now doing in proclaiming that all their laws should remain in force? How was the cutting out of a man's tongue and the confiscation of his property for reviling the name of Christ to be harmonized with the clause forbidding the infliction of cruel or unusual punishment? or the exemption of certain classes from certain kinds of punishment, with our democratic principle of equality before the law? It does not appear that either of these particular provisions of the Spanish law was ever invoked under our authority, nor is it probable that they would have been enforced. Still they were a part of the laws declared to be in force. Again, the Catholic religion was the state religion in Louisiana, no other being tolerated in public. It was supported in part by the public treasury. Yet the first amendment to the Constitution says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Surely Congress cannot delegate powers prohibited to it. But the adoption of the Spanish law certainly meant the establishment of the Catholic religion to the exclusion of others. The stipulation of the treaty that the inhabitants should be protected in the enjoyment of their religion did not mean that the Catholic religion must be supported by the state, and had it meant this it could not rise superior to our fundamental law.

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[1] Amer. State Papers, For. Rel., v, 652.

[2] *Writings* (Ford), viii, 283.

Halleck makes an excellent comment regarding what municipal laws remain in force upon the completion of conquest and the transfer of sovereignty:

> When it is said that . . . . the law municipal continues till changed by the will of the conqueror, it is not meant that these laws, *proprio vigore*, remain in force, but that, it is presumed, the new political sovereign has adopted and continued them as a matter of convenience. . . . . When, therefore, we come to pronounce upon the force of a law of the conquered people after the conquest, and to determine whether it has been tacitly adopted by the conqueror, we must look to the character of its provisions, and compare them with the laws and institutions of the conquering state, that is, the will of the conqueror as *expressed* by himself in similar matters. Whatever is in conflict with, or directly opposed to, such expressions of his will, we cannot presume to have been adopted by his tacit consent. Hence, Lord Coke says, if a Christian

king should conquer an infidel country, the laws of the conquered country, *ipso facto,* cease, because it is not presumed that a Christian king has adopted the laws of an infidel race.[1]

Of course the principle just enunciated applies to territory acquired by peaceable cession as well. It will be noticed that Halleck spoke of tacit adoption. Perhaps we might say that the same principle would apply to adoption by actual proclamation, it being assumed even in this that the new sovereign does not mean to adopt laws and customs at variance with such as are already in force. This certainly would be a liberal interpretation; but Mr. Jefferson's course in Louisiana cannot be defended even on this interpretation, for we find him speaking of introducing, "as soon as can be," [2] the *habeas corpus,* freedom of the press, and freedom of religion, all of which are guaranteed by our Constitution.

IV. The Work of Administration and Its Effects.

The French and Spanish in Louisiana did not take "French leave" after the delivery of the territory to Governor Claiborne, a fact which caused some annoyance and uneasiness to the Americans. So early as February 20, 1804, Secretary Madison wrote to the governor that it would be well to get Morales, the former Spanish intendant, out of Louisiana in a discreet way. Laussat embarked April 21, 1804, and the Spanish commissioners made their adieus three days later. About three hundred Spanish troops had been sent to Pensacola a few weeks before this, up to which time the American troops had to make out as best they could in the redoubts surrounding the town and under their tents.[1] But other prominent Spaniards still lingered. Spain had been very reluctant to see the province pass into the hands of the United States, and it was commonly believed, with apparently good reason, that these delays were occasioned by the hope of profiting by disaffection in Louisiana, or by some turn in the political wheel of fortune. It was not until July 9 that the powder magazine opposite New Orleans was delivered. In the Natchitoches district the operations of the Spanish emissaries were particularly offensive.[2] Finally (August 28), Secretary Madison authorized Governor Claiborne to say that their prolonged stay had not met with approbation, and suggested October 1 as a suitable day for letting it be known.[3] October 9 the governor informed Don Casa Calvo, the leader of the Spanish, of the secretary's desires.

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[1] *Int. Law,* ii, 488; *cf.* Chicago, Rock Island & Pacific Ry. *vs.* McGlinn, 114 U. S., 542-546.

[2] *Supra,* 32.

Regarding the internal administration of Louisiana up to the organization of the territorial government under the act of Congress, there is not much to be said. The first step taken (December 30) related to the organization of the judiciary, in which Governor Claiborne exercised his legislative powers by creating a court of pleas, composed of seven justices, with certain defined collective and individual jurisdictions in both civil and criminal cases.[4] Another act of some consequence was the effort to establish the Louisiana Bank to meet the demand for a circulating medium. Still another was his effort to organize the militia.[5]

In January, 1804, a contingency arose for which the governor had received no instructions and for which he had made no provisions. It was nothing less than the arrival of a slaver at New Orleans with some fifty negroes for sale. Turning to the late Spanish contadore, Mr. Leonard, he learned that such importations had been allowed by Spanish law and custom since 1793, whereupon he left the importer to pursue his own course.[1]

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[1] Madison's *Works* (1884), ii, 199.

[2] Amer. State Pap., For. Rel., ii, 689 *et seq.*

[3] *Works* (1884), ii, 203.

[4] Martin, *Hist. La.*, ii, 238.

[5] Gayarré, iv, 15 *et seq.*

According to some accounts there was no little discontent among the people over their new situation. The reader will recall that our commissioners said the American flag was raised "amid the acclamations of the inhabitants." Martin tells us that "a group of citizens of the United States, who stood on a corner of the square, waved their hats in token of respect for their country's flag, and a few of them greeted it with their voices. No emotion was manifested by any other part of the crowd."[2] After the transfer there were some open expressions of discontent.

The general causes of discontent were said by Laussat to be "the sudden introduction of the English language, which hardly anybody understands, into the daily exercise of public authority and in the most important acts of private life; the affrays and tumults resulting from the struggle for pre-eminence, and the preference shown for American over French dances at public balls; the invasion of bayonets into the halls of amusement and the closing of halls; the active participation of the American general and governor in those quarrels; the revolting partiality exhibited in favor of Americans or Englishmen, both in the audiences granted by the authorities and in the judgments rendered; the marked substitution of American for Creole majorities in all administrative and judicial bodies; the arbitrary mixture of old usages with new ones, under pretext of change of domination; the intemperate speeches; the scandalous orgies;

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[1] Amer. State Papers, Misc., i, 390.

[2] *Hist. La.*, ii, 199.

the savage manners and habits; the wretched appointments to office—what more shall I say, Citizen Minister?"[1]

More specifically, it appears that some American patrols were guilty of insolence toward some of the inhabitants.[2] The native militia had dissolved. The governor's efforts to encourage its maintenance by enrolling Americans were only looked upon with suspicion. His plan to relieve the financial stringency by an institution entirely unknown to the people, a bank, only aroused their fears of more *assignats* and *liberanzas*. The official use of the English language, of which suitors were ignorant, was particularly annoying. The judges were almost wholly ignorant of the Spanish laws. In former times appeals lay to Cuba and even to Madrid. But now, said the plaintiffs, their governor, who was not even attended, as the Spanish governors were, by a legal adviser, was their court of last resort; and the errors into which he could not help falling were without redress.[3]

These causes of discontent finally found expression in a French pamphlet, "A Sketch of the Political and Givil Situation of Louisiana, November 30, 1803, to October 1, 1804," which had a wide circulation. Yet this paper, though it attacked unsparingly the administration of affairs in Louisiana, spoke respectfully of Governor Claiborne's integrity and the purity of his motives. In a letter to Secretary Madison, the governor tried to vindicate himself, and denied *in toto* many of the charges brought against him, both in this pamphlet and in Laussat's letter, though he knew nothing of the latter.[4]

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[1] Gayarré, iv, 10.

[2] Marbois, *Hist. de la Louisiane*, 360; Eng. trans., 335.

[3] Martin, *Hist. La.*, ii, 246.

[4] Amer. State Papers, Misc., i, 399; Gayarré, iv, 24 *et seq.*

But the chief source of discontent seems to have been the form of government proposed to be put into operation by the act of Congress, October 1, 1804. According to Laussat, the excitement became intense when the contents of this act became known at New Orleans. Placards were put up in which insurrection was openly preached, and public officers were driven away when they attempted to tear them down.[1] Several public meetings were held to protest against the act, and a deputation was sent to Washington to present their grievances.

And this reveals much concerning the causes of general irritation. The people of Louisiana had supposed that they were to be given at once all the blessings of liberty and self-government, whatever they were, of which the Spanish had kept them in utter ignorance. Had no such promise ever been made, and had the province been ruled with an iron hand, it is not at all improbable that the open expressions of discontent would have been fewer, especially at first. Yet these people were exercising one of the very fundamentals of freedom, the right of petition and free speech. Mr. Jefferson had spoken of the freedom of the press as though it was not to be guaranteed at first, but Governor Claiborne does not seem to have interfered with this, although it added somewhat to his embarrassments.[2] The situation of the country demanded that it be Americanized, consequently a change of language was inevitable; but it could have been accomplished with less friction had men been sent who were familiar with Spanish and French. Perhaps the Americans were numerous enough to justify the bestowal of office upon some of them, but it must have been trying to the natives to be ruled by these gentlemen according to American notions of right and wrong, supported by occasional bits of American law, rather than under the familiar Spanish laws, as the governor had promised them.

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[1] Gayarré, iv, 11, 17.

[2] *Ibid.*, 26.

The aspersions cast upon Governor Claiborne by Laussat do not appear well founded. About the most serious charge that can be brought against him is his ignorance of French and Spanish. This, it must be confessed, was a serious one in the position he occupied. But his subsequent career, continuously governor of the Territory, first governor under the State constitution, and elected to the United States Senate, is a high testimonial to his character and to the esteem in which he was finally held by the people he had been sent to train in the first steps of liberty. After all has been said, it does not appear that the causes of discontent were much more than such as are naturally incident to a transfer of sovereignty, especially where great expectations have been raised which cannot be suddenly realized.

Very little remains to be said respecting the administration of Upper Louisiana, that vast domain where society was then in the primitive state which characterizes the outposts of civilization.

It was not until January 16, 1804, that the French and Spanish commissioners gave orders for the delivery of the posts in Upper Louisiana.[1] Captain Amos Stoddard was detailed to receive them. There cannot have been much for him to do in the way of administration. June 16, 1804, he forwarded to President Jefferson some documents relating to the inhabitants and the resources of the country.[2] Instead of manifesting displeasure at the presence of troops, the people protested on learning that some of the few soldiers then among them were to be withdrawn.[1] The troops were wanted for protection against the Indians. However, the soldiers were not so well pleased, finding it difficult to live on their small pay where prices were so high. November 8, 1805, a memorial was sent to Congress praying for increased pay on this ground.

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[1] Amer. State Papers, For. Rel., ii, 690.

[2] Messages and Reports, 1804.

The act of March 26, 1804, which divided the Louisiana country, consigned the people of the upper portion to the executive and judicial authority of the governor of the Indiana Territory. The people were so dissatisfied with the prospects of this *quasi*-foreign bondage that they chose delegates to a convention to protest against it. This body, composed of sixteen members from five settlements, met at St. Louis on September 13, 1804, formulated their grievances, and selected two delegates, Augustus Chonteau and Eligius Fromentin, to present them to Congress. Captain Stoddard attested the genuineness of their credentials, which were signed by the president and secretary of the convention.[2] March 3, 1805, an act was approved creating a territorial government of the first grade. General Wilkinson, still an officer of the army, was appointed governor. His position was sometimes spoken of as that of military governor,[3] but the mere fact of his being a military man hardly justifies the application of the term to an office not so regarded when held by a civilian.

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[1] Amer. State Papers, Misc., i, 403.

[2] *Ibid.*, 400 *et seq.*

[3] Claiborne, *Miss. as a Province*, etc., 246; Schouler, *Hist. U. S.*, iii, 82.

CHAPTER II

THE ANNEXATION OF WEST FLORIDA

I. How the Conquest Was Effected

THE story of the acquisition of the Floridas is almost continuous with that of Louisiana. Even before the ratification of the Louisiana treaty, the Americans began to cast longing eyes upon West Florida, and to wonder if it could not be included in the cession. In fact, as soon as the treaty was signed the American negotiators began to lay claim to this territory. Congress, by the act of February 24, 1804, authorized the President to erect the Mobile country, as far west as the Pascagoula, into a separate collection district, although possession had not then been obtained. No boundary was designated toward the east. When this act was published it aroused the wrath of the Spanish minister, Yrujo, who went to the State Department and commented upon it in tones which clearly revealed his anger. As an effort was being made to conciliate Spain and win the support of France to our claims, Mr. Madison gave him such assurances as were consistent with the expression of a claim as far as the Perdido.[1] May 20, 1804, President Jefferson issued a proclamation creating the district, but defined it in rather vague terms as the "shores lying within the boundaries of the United States." Fort Stoddard, which was on the Mobile river above the thirty-first parallel, was made the port of entry. But the Spaniards retained possession of Mobile, where their customs regulations, particularly the collection of duties on goods passing the town to and from different parts of the United States, continued for several years to be a source of no little annoyance to the Americans.

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[1] Amer. State Papers, For. Rel., ii, 576.

The authority and power of Spain in West Florida were now very weak, but she succeeded in putting down an insurrection in 1804, when the inhabitants of the West and East Feliciana and East Baton Rouge parishes, who were largely of English and American origin, rose in the hope of securing American intervention.[1] A later attempt was more successful. The insurgents, or "patriots," led by Captains Thomas and Depassau, and Reuben Kemper, who lived on the American side, marched against the fort at Baton Rouge, which was garrisoned by about thirty soldiers, and captured it at the first assault.[2]

This act was soon followed by a convention, September 26, 1810, which proceeded to act for the people in a sovereign capacity. They recited a number of grievances in a general way, and declared that they were without hope of protection from the mother country. Appealing to the Supreme Ruler for the rectitude of their intentions, they then declared the several districts composing West Florida to be a free and independent state, with all the powers of a sovereign nation. An official copy of this declaration was ordered to be forwarded to Governor Holmes, of the Mississippi Territory, to be by him forwarded to the President of the United States, with the hope that it might "accord with the policy of the Government to take this State under their immediate and special protection, as an integral and inalienable portion of the United States." In a separate letter addressed, under authority of the convention, by John Rhea, its president, to Mr. Robert Smith, Secretary of State, it was presumed that the claims of the State to the unlocated lands would not be contested by the United States, as they had tacitly acquiesced in the claims of France and Spain for seven years. A loan of one hundred thousand dollars was solicited from the Government, to be repaid by the sale of these lands.[1]

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[1] Gayarré, iv, 18.

[2] Claiborne, *Miss. as a Prov.*, 304.

The convention seems to have been confined to the Baton Rouge district, but it assumed to speak for the other parishes, and proceeded to subdue them. Colonel Kemper was sent to the Tombigbee settlement, in the United States, to recruit a force and move against Mobile. Receiving much encouragement from the Americans, he called upon the Spanish commandant to surrender Mobile. While waiting near the city his men became intoxicated, fell into confusion, and were killed or captured by a squad of Spanish troops. Colonel Kemper escaped. He and some of his followers were afterwards arrested by Judge Toulmin, of Mississippi, for waging war against the subjects of a nation at peace with the United States. However, the historian Claiborne assures us that this proceeding of the judge met with no approbation in high quarters. Indirectly the government applied for the pardon of the men who were captured.[2]

The appeal of the Baton Rouge convention to Washington for assistance received no direct answer. October 27, President Madison issued a proclamation reciting the claims of the United States to West Florida, and giving the reasons for not taking possession of it sooner. Now the condition of affairs there, which threatened the security and tranquility of our adjoining territory and afforded new facilities to violators of our revenue laws and of those forbidding the importation of slaves, made it imperative for the United States to occupy the country. The final status of the country was still to be a subject of fair and friendly negotiations. In view of these facts, Governor Claiborne would proceed to exercise over the said territory the functions legally appertaining to his office as Governor of the Orleans Territory. The good people were invited to pay due respect to him and to obey the laws, and were promised protection in liberty, property, and religion.

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[1] Ann., 11 Cong., 3 Sess., 1252 *et seq.*

[2] *Miss. as a Prov.*, 308.

The same day Secretary Smith transmitted this proclamation to Governor Claiborne, with orders to print it in English, Spanish, and French, and circulate it extensively. "The Secretary of War," said he, "will order the officers of the frontier posts to assist you in passing the wilderness. You will lose no time in organizing the militia of the district, bounding parishes, and establishing parish courts. Do all your powers allow to maintain order and protect the inhabitants. The Legislature of Orleans may enlarge your powers and give the district representation in the general assembly. Should you be opposed, the commanding officer of the regular troops on the Mississippi will have orders from the Secretary of War to afford the requisite aid upon your requisition. Do not use force against any particular place which may still be in the hands of the Spaniards. You are authorized to draw up to $20,000."[1]

Governor Claiborne was just returning from a visit to the States. When he appeared at Baton Rouge, December, 1810, supported by two companies of Mississippi militia, the convention government dissolved. He then hoisted the United States flag and issued a proclamation incorporating the territory into that of Orleans. The next step was to organize parishes and appoint administrative officers. In the latter work he pursued a policy of conciliation by appointing John Rhea, "General" Thomas, and others who had been prominent in the convention and the government instituted by it. Early in January he sent flags, proclamations, and commissions to the remoter parishes of Biloxi and Pascagoula. In the latter place the bearer, finding none of the inhabitants able to read or write, prevailed upon Captain George Farragut, sailing-master of the navy, to accept a commission as justice of the peace.[1]

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[1] Ann. Cong., *ibid.*

In all of these operations no opposition appears to have been encountered from the Spanish authorities. Indeed, Governor Folch wrote, December 2, 1810, to Secretary Smith, to say that he would deliver Mobile to the United States upon equitable terms of capitulation if he did not receive aid from Havana during the month. At the same time he asked that the commandant at Fort Stoddard might be directed to assist him in driving back Colonel Kemper, whose movements have already been mentioned. No delivery of Mobile appears to have been made.

II. The Legal Aspects of the Annexation

The action of our administration in West Florida did not elicit so much as a diplomatic protest from Spain. Indeed, that unfortunate country was hardly in a position to assert her rights, owing to her own internal disorders incident to the schemes of Napoleon. But the British chargé d'affaires, Mr. J. P. Morier, entered a protest in her name. His letter, however, received no reply until he wrote again asking for one. Mr. Smith then merely referred to the public documents to show that the act was not hostile to Spain, and added that our representative at London had been instructed to give the necessary explanations to the British Government. July 2, 1811, Mr. Foster, the British minister, wrote Mr. Monroe, then Secretary of State, to say that Mr. Pinkney had offered no explanation, and that, if the military occupation was persevered in, he must protest against it as contrary to every principle of public justice, faith, and national honor, and injurious to the alliance subsisting between the British and Spanish nations.[1]

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[1] Claiborne, *Miss. as a Prov.*, 305 *et seq.*

Mr. Monroe denied the right of Great Britain to interfere, and proceeded to justify the seizure. It had not been made, as Mr. Foster had intimated, through selfish motives at a time when Spain was known to be impotent. Many injuries suffered at the hands of Spain, spoliations and the suspension of the right of deposit at New Orleans in particular, would have justified reprisals. But the United States did not rely on these; their claims were based on the treaty by which Louisiana was acquired. Since 1805 the government of Spain had hardly been felt in West Florida, consequently that province had fallen into disorder. Only when the inhabitants rose and took matters into their own hands did the United States interfere.

Though it was now easy enough to get up some sort of justification as against foreign protests, Mr. Madison had not been so sure of his ground at home. October 19, 1810, when he knew something of what was going on, but had not yet received any "communication from the successful party at Baton Rouge," he wrote to Mr. Jefferson to say that the crisis in West Florida presented serious questions as to the adequacy of the laws of the United States for territorial administration. He feared that the near approach of Congress might subject any intermediate interposition of the Executive to the charge of being premature and dis-

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[1] Amer. State Papers, For. Rel., iii, 542.

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respectful, if not illegal. Still he thought the exigencies of the case, the country to the Perdido being ours and in danger of foreign seizure, would justify him in taking possession.[1]

But his doubts about the legality and propriety of occupation soon vanished. What he actually did has already been told. October 30, he wrote to Pinkney, our minister in London, that his action was "understood to be within the authority of the Executive." [2] In his annual message, December 5, he explained that this action had been taken because "the Spanish authority was subverted, and a situation produced exposing the country to ulterior events which might essentially affect the rights and welfare of the Union. In such a conjuncture I did not delay the interposition required for the occupancy of the territory west of the Perdido to which the title of the United States extends, and to which the laws for the Territory of Orleans are applicable. . . . The legality and necessity of the course pursued assure me of the favorable light in which it will present itself to the Legislature and of the promptitude with which they will supply whatever provisions may be due to the essential rights and equitable interests of the people thus brought into the bosom of the American family."

But the "legality and necessity" of the act were not accepted in Congress without question. The discussion was brought on by a bill, reported December 18, by the special Senate committee to which the above portion of the President's message was referred. This bill proposed to extend the Territory of Orleans to the Perdido and to declare the laws of the Territory in force over that region.

The opposition, led by Senator Horsey, of Delaware, first denied any right to the territory under the Louisiana treaty. With this part of the argument we are not concerned here more than to remark that there was "something to be said on both sides," and that, while many men of that day considered our claims well founded, they are not generally so regarded to-day. Having decided that we had no claim to West Florida, Senator Horsey declared that the Executive, in issuing the proclamation of October 27, which the bill proposed to put in the form of a statute, had exercised authority derivable from neither the Constitution nor the laws of the United States. In ordering forcible military possession to be taken he was making war; in ordering the enforcement of the laws of the Orleans Territory he was exercising legislative functions. Both these powers belonged to Congress. But even if the country was ours, no law of Congress could be cited authorizing the act. The act of October 31, 1803, which empowered the President to take possession of the country ceded by France, expired October 1, 1804. If the act of February 24, 1804, authorizing the Executive to create a collection district at Mobile, "whenever he shall deem it expedient," be cited, Mr. Madison himself, while Secretary of State, had answered a protest of the Spanish minister against this law by saying that its provisions would not "be extended beyond the acknowledged limits of the United States until it shall be rendered expedient by friendly elucidation and adjustment with his Catholic Majesty." The necessity and expediency of the act the senator rejected *in toto*.

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[1] *Writings*, ii, 484.

[2] *Ibid.*, 488.

Against this argument Senator Clay, of Kentucky, after discussing our title to the territory at some length and satisfying himself that it was good, defended the legality of the President's course. The first section of the act of October 31, 1803, authorizing the President to occupy and hold the country ceded by France, was unlimited, hence still in force. The second, authorizing the creation of a temporary government, expired by limitation at the end of the Congress which passed the bill. To this alone was the act of March 26, extending the former till October 1, 1804, applicable. The act of February 24, 1804, made it the duty of the President to create a collection district at Mobile whenever he deemed it expedient. That time had now come, and, instead of usurping the war- and law-making power, he would have violated that clause of the Constitution which required him to see that the laws were faithfully executed, had he longer forborne to act. In addition to this, when a power allowed a colony adjacent to us to fall into such disorder as to menace our peace and threaten the integrity of the Union, we had a right, upon the eternal principle of self-preservation, to lay hold of it. This principle alone would warrant our occupation of West Florida.[1]

Especially noteworthy is the absence of any consideration of the people most affected by this action. President Madison did indeed say something about their "essential rights and equitable interests," but just what he meant is not clear. Mr. Rhea's request, in the letter mentioned above, for pardon for all deserters within the territory was not noticed. Governor Holmes was directed to inform the people that their claims to the public land could not be entertained for a moment. He was further advised that the President could not recognize in the convention of West Florida any independent authority whatever to propose or form a compact with the United States.[2]

The Senate bill to legalize the proclamations never passed, but the territory was never surrendered. A part of it was subsequently, by act of Congress, added to Louisiana when she was admitted as a State.

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[1] Ann., 11 Cong., 3 Sess., 25, 46, 55, 62 *et seq.*

[2] *Ibid.*, 1259.

CHAPTER III

THE CONQUEST OF FLORIDA

I. Gradual Encroachment and Final Seizure

After the events just recited the eyes, not to say the hands, of the Americans were never taken off the Floridas, and the march of events leading to their permanent occupation was more or less steady. When Governor Folch's letter, offering to surrender Mobile, was received, President Madison transmitted it to Congress, January 3, 1811, and recommended "to the consideration of Congress the seasonableness of a declaration that the United States could not see, without serious inquietude, any part of a neighboring territory, in which they have in different respects so deep and just a concern, pass from the hands of Spain into those of any other foreign power." He further recommended that the Executive be authorized "to take temporary possession of any part or parts of the said territory, in pursuance of arrangements which may be desired by the Spanish authorities, and for making provision for the government of the same during such possession."

The declaration of principles first quoted was embodied in a resolution of Congress, approved January 15, 1811. The same day an act was approved authorizing the Executive to occupy and govern East Florida under the conditions just named. This act was passed in secret, and was not published until 1818.

To carry out this act, President Madison selected General George Matthews and Colonel John McKee, and instructed them to occupy the country, if peaceably surrendered by the Spanish authorities, or if in danger of being seized by some foreign power. The War Department would issue orders to have any necessary military assistance rendered.

Such a commission necessarily left much to the discretion of the holder. Soon after arriving in the neighborhood of St. Mary's, General Matthews found a condition of affairs, possibly brought about in part by his presence, which seemed to him to warrant action. Amelia Island, a Spanish possession near the mouth of the St. Mary's, was almost in a state of anarchy. Smuggling was the principal business. A large party of men crossed over from the American side and succeeded in organizing a revolution in the country between St. Mary's and St. John's. Some United States gun-boats, under command of Commodore Campbell, dropped down the river in advance of the insurgents and moored opposite Fernandina, on Amelia Island. When the insurgents, accompanied by some American troops, appeared, the Spanish commandant surrendered without firing a shot. In the capitulation it was stipulated that the island should be surrendered to the United States within twenty-four hours. It was further agreed that the port should not be subject to any of the restrictions on commerce then existing in the United States, but should be a free port until May 1, 1813. Vessels owned by Spanish subjects on the island were to be entitled to regular American registers. The proceedings were confirmed by General Matthews, and the American flag was substituted for that of the "patriots."[1]

President Madison disapproved of these proceedings as soon as he heard of them, relieved General Matthews, and asked Governor Mitchell, of Georgia, to take his place. He was directed to endeavor to restore the previous status of affairs, but was not to restore the island until assured by the Spanish governor that the "patriots" would not be subjected to his resentment.[1]

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[1] Niles's *Register*, ii, 93.

But possession was not immediately given to the Spanish. For more than a year the island rested under the American flag and was subject to the regulations imposed by our officers. May 6, 1813, Governor Kinderland arrived from St. Augustine with a collector and several civil officers, and received peaceable possession.[2]

February 12, 1813, an act was approved authorizing the Executive to employ the army and navy in occupying and holding so much of the country west of the Perdido as was not then in the possession of the United States, and for affording protection to the inhabitants thereof.

The Executive was not slow to act under this authority. April 15, 1813, the Spanish garrison at Mobile surrendered to General Wilkinson, and were immediately shipped to Pensacola in public transports.[3] A proclamation, dated April 13, was issued by the general, assuring the people that he had come, by order of the President, to enforce the laws of the United States and to give effect to the civil institutions of the Mississippi Territory. The public faith was pledged for the protection of persons and property. Such as desired to depart would be allowed to do so, with goods and chattels.[4]

The country between the Pearl and the Perdido had already been annexed by Congress, May 14, 1812, to the Mississippi Territory. July 22, the conquest was followed up by an act making Mobile a port of entry.

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[1] Amer. State Papers, For. Rel., iii, 572 *et seq.*

[2] Niles, iv, 216.

[3] Niles, iv, 209.

[4] *Ibid.*, 224.

At a subsequent date Amelia Island again became a source of anxiety. November 12, 1817, the Secretary of War issued orders the object of which was to break up a nest of adventurers who, under the leadership of Aury, had seized the island and declared their independence. Fernandina was to be occupied and the violation of our revenue laws prevented. The occupation was effected December 23-24, without opposition.[1]

About the same time affairs were approaching a crisis farther to the west. The Spanish authorities there, through weakness, indifference, or maliciousness, probably the first, in violation of express treaty stipulations, allowed the Indians in Florida, together with runaway negroes, to harass our borders until it was deemed no longer bearable. December 16, 1817, orders were issued by Mr. Calhoun to General Gaines, the commanding officer at Fort Scott, Georgia, to chastise the Indians, and to attack them within the limits of Florida, should it be found necessary, unless they took refuge under a Spanish post. In that event he was to notify the Department and await orders. Ten days later General Jackson, the division commander, was ordered to assume command and direct the operations in accordance with the above orders, copies of which were furnished to him.[2]

In offering his services in the War of 1812, General Jackson said that his Tennessee men had no "constitutional scruples," but would, if directed, plant the American eagle on the walls of Mobile, Pensacola, and St. Augustine.[3] He appears to have thought that the time had now arrived. "This can be done," he wrote privately to President Monroe, asking for larger latitude in his orders, "without implicating the government. Let it be signified to me through any channel (say Mr. J. Rhea) that the possession of the Floridas would be desirable to the United States, and in sixty days it will be accomplished." [1] He received no reply, and probably went on the theory that "silence gives consent." President Munroe was sick at the time Jackson's letter was received, and is said not to have read it for a year or more.

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[1] Ann., 17 Cong., 1 Sess., 2483. [2] Ann., 15 Cong., 2 Sess., 2158.

[3] Schouler, iii, 67 *et seq.*

In a short time after reaching his post the general was pursuing his savage foes through the forests and swamps of Florida. Before the end of May the Spanish troops at Pensacola had been captured and sent off to Havana at the expense of the United States, and the American flag was flying over the forts. "The articles of capitulation," said the general, "with but one condition, amounted to a complete cession to the United States of that portion of the Floridas hitherto under the government of Don José Mazot." The condition referred to was that the country would, by implication, be returned to Spain whenever she had the power or was willing to abide by her treaty stipulations and maintain her neutrality.[2]

The stipulations referred to were found in the fifth article of the treaty of 1795, by which each of the contracting parties agreed "to restrain by force all hostilities on the part of the Indian nations" within their respective boundaries upon the citizens of the other.

The articles of capitulation contained the usual promise to respect property and private rights. The Catholic religion was to be maintained, but all were to be tolerated. "I deemed it most advisable," continued the general, "to retain, for the present, the same government to which the people had been accustomed, until such time as the Executive of the United States may order otherwise. It was necessary, however, to establish the revenue laws of the United States, to check smuggling, which had been carried on successfully in this quarter for many years past, and to admit the American merchant to an equal participation in a trade which would have been denied under the partial operation of the Spanish commercial code. Captain Gadsden was appointed by me collector, and he has organized and left the department in the charge of officers on whom the greatest confidence may be reposed." Colonel King was appointed military and civil governor, and was ordered to take possession of the archives of the government and see that they were preserved.[1]

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[1] Schouler, iii, 67 *et seq.*

[2] Ann., 15 Cong., 2 Sess., 2237, 2208, 2239, 2222.

II. Justification of the Seizure

General Jackson attempted to justify his conduct in the proclamation announcing the appointment of Colonel King. The occupation was not an act of hostility to Spain, nor an effort to extend the boundaries of the United States; its purpose was to control the Indians, to whom the Spanish authorities were often compelled, from policy or necessity, to issue munitions of war, thus enabling, if not exciting, them to raise the tomahawk against us. "The immutable laws of self-defense, therefore, compelled the American Government, to take possession of such parts of the Floridas in which the Spanish authority could not be maintained." In a letter to the Secretary of War, dated June 2, 1818, he said: "On the immutable principles of self-defense, authorized by the law of nature and nations, have I bottomed all my operations."[2]

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[1] Ann., 15 Cong., 2 Sess., 2241.

[2] *Ibid.*, 2209.

It could hardly have been expected that such conduct would pass unnoticed by even the most impotent power. Negotiations were then pending for the purchase of Florida. These were immediately broken off at Madrid, with a demand for the punishment of the offender and a disavowal of his acts, the restitution of the ports, and the payment of an indemnity. Mr. Onis, the Spanish minister at Washington, declared that "no principle can be adduced to support or justify the hostile proceedings of General Jackson in Florida, marked as they are by a series of outrages unprecedented and unknown in history. He, as your own government admits, acted contrary to orders. Public opinion in the United States has uniformly reprobated these excesses, as well as the specious pretext with which he has endeavored to gloss them over." [1]

But the general had an able defender in the Secretary of State, Mr. Adams, who adopted this line of defense: "The President, to demonstrate to the world that neither the desire of conquest, nor hostility to Spain, had any influence in the councils of the United States, has directed the unconditional restoration to any Spanish officer duly authorized to receive them, of Pensacola and the Barancas, and that of St. Mark's to any force adequate to its defense against the attack of the savages. But the President will neither inflict a punishment, nor pass a censure upon General Jackson for that conduct, the motives for which were founded in the purest patriotism; of the necessity for which he had the most immediate and effectual means of forming a judgment, and the vindication of which is written in every page of the law of nations, as well as the first law of nature—self-defense." He then instructed Mr. Erving, our minister at Madrid, to demand the punishment of the Spanish governor and commandant in Florida for violating the engagements of Spain with the United States.[1]

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[1] Ann., 15 Cong., 2 Sess., 1885, 1925, 1907.

This demand, perhaps more audacious than just, quieted Madrid. After hearing the arguments by which it was backed up, the other powers decided not to interfere.

In Congress, also, the matter was thoroughly aired. In both houses majorities of the committees to whom the matter was referred reported adversely to the general. For more than three weeks the debates on these reports occupied almost the entire time of Congress and excited much interest throughout the country. In the end, however, not a single charge was sustained by a vote of censure. Even the seizure of Pensacola went unrebuked, the vote in the House being seventy to one hundred. But it is not to be presumed that the general's conduct was believed by Congress to have been altogether justifiable and legal. The absurdity of condemning a general whose acts had been so far justified by the administration as to satisfy, or at least silence, the countries most interested, Spain and England,[2] as well as the popularity of the hero of New Orleans, must have had its influence.

The bold stand taken by Secretary Adams, who seems to have been Jackson's most ardent supporter, was not concurred in by all the Cabinet, as later events revealed. The task which President Monroe undertook was to shield the general, the net results of whose exploits was productive of good to the country, and to avoid a war with Spain. The disobedience to orders was overlooked. The orders issued by Jackson to Gaines to capture St. Augustine were promptly countermanded. Hostile intentions were denied, and an offer was made to restore the posts. And thus the President's ends were accomplished.

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[1] Ann., 15 Cong., 2 Sess., 1932.

[2] England, for the execution of Arbuthnot and Ambrister.

III. Military Administration

But little record of the actual proceedings of the military governor in Florida has come down to us, nor is it likely there was much to record. At that time Pensacola, the seat of empire, was only a straggling village of about five hundred dwellings. Its commerce cannot have been very considerable, but Mr. Onis, the Spanish minister at Washington, thought the revenues worth having, and demanded them of Mr. Adams, Secretary of State.[1] In reply, Secretary Adams said that the revenue thus collected was far from adequate to meet the expenses incurred in prosecuting a war which Spain was bound to prevent. This deficit Spain should make good.[2]

In the internal administration no military officer except Colonel King held any office. The civil officers were appointed from among the citizens, with Mr. McKinsey, of Mobile, at the head of the magistracy. Some of the justices thus appointed followed Spanish custom in deciding cases in a summary way, but failed to make a record of their judicial proceedings. Several cases of importance were decided in this way, and, as they could not be followed up for want of proper tribunals and officers, no little inconvenience resulted.[3]

The Nashville *Clarion*, June 16, said that the arrival of the American troops was hailed with joy at Pensacola. Real property rose three hundred per cent. in three days.[4] This must have been very gratifying to the Nashville speculators who have bought land there in the hope of American occupation.[5] About three months after the Americans entered Pensacola, General Gaines reported that the Spanish who remained had found no fault with the authorities established by General Jackson, and that the utmost harmony prevailed among all classes of citizens.

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[1] Ann. 15 Cong. 2 Sess., 1907, 1945.

[2] *Ibid.*, 2317.

[3] Amer. State Papers, Misc., ii, 902.

[4] Niles, xiv, 337.

[5] Ann., *ibid.*, 2300.

The order to General Gaines to deliver Florida to the Spaniards was issued as early as August 14, 1818,[1] but the actual delivery of Pensacola did not take place until February 8, 1819.[2] Amelia Island does not appear ever again to have passed out of the hands of the United States. Concerning the administration of this island a few more details have been preserved.

Soon after Fernandina was occupied, Major Bankhead, the commanding officer, issued a series of ordinances (January 5, 1818) for the government of the island, to be effective until the further pleasure of the United States was known. One related to the customs, and required that duties on goods subject to duty in the United States should be paid to the commanding officer for the benefit of the United States. It was recommended, however, that such goods be landed and entered at St. Mary's. Another made certain regulations for the collection of debts. Two justices of the peace, with power to appoint a sheriff, were installed to administer the laws, but were directed to make no decision in a criminal case affecting the life of the accused. The commanding officer reserved the right to decide all cases of riot. Direction was further given that the usages and customs of the United States should be followed in all cases.

In reporting these regulations, Major Bankhead said that necessity had impelled him to make them in order to settle disputes. The people seemed to be determined to avoid the payment of debts and to plunder wherever they could. The two justices whom he had appointed in conjunction with Commodore Henly had discharged their duty in a satisfactory manner.[1]

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[1] *Ibid.*, 2174.

[2] Niles, xvi, 40, 160.

Mail facilities were not very good in those days, but this report (dated January 10, 1818) can hardly have been four months in reaching Washington. May 14, 1818, Secretary Calhoun ordered the major to discontinue taking bonds on goods imported into Amelia Island, and to turn over the bonds already taken to the collector at St. Mary's, at which place goods were to be landed thereafter. The purpose of this order is not definitely stated, but appears to have been merely to stop the irregular collection of duties at Fernandina on goods intended for importation into the United States. If any goods were carried from St. Mary's to Fernandina, they probably went in free of duty. No further directions appear to have been issued from Washington.

In spite of the conditions of war brought on by the occupants, they endeavored to manage affairs on a peace basis. This is illustrated by a demand made by General Gaines, December 28, 1818, then in Amelia Island, of Governor Coppinger for the release of a soldier and two citizens reported to have been captured at St. John's by a body of armed men led by a Spanish officer. Explanations and the punishment of the offender were expected. The governor's reply is not given.

The inhabitants of Amelia Island were in bad odor, it not being believed that they had gone there simply for the sake of the climate. They were few in number, and about the only government needed was one of strict police control. This was maintained by the commanding officer until the island was finally ceded with Florida in 1821.

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[1] H. Ex. Doc., 15 Cong., 2 Sess., no. 117.

CHAPTER IV

THE FINAL ACQUISITION OF FLORIDA

I. TAKING POSSESSION OF THE COUNTRY. ITS CONDITION. REORGANIZATION

THE treaty by which the Floridas finally came to the United States was signed February 22, 1819, but ratifications were not exchanged for two years. It was proclaimed at Washington on the second anniversary of its signature. The stipulation regarding the inhabitants was substantially the same as that in the Louisiana treaty, with the addition that such as desired to remove to the Spanish dominions should be permitted to sell or export their effects, at any time whatever, without being subject to any duties. March 3, 1821, an act of Congress was approved authorizing the President to take possession of and govern the Floridas under substantially the same terms as those granted in the act of October 31, 1803, for Louisiana. In the same act the revenue laws were extended and the President was authorized to appoint such officers as he might think necessary for their execution. After this no action was taken by Congress until March 30, 1822, when the act establishing the Territory of Florida became a law. The intervening time was for Florida one of "great productivity—of documents," as was wittily remarked at the time.

In a sort of poetic justice to, and justification of, General Jackson, that worthy was commissioned to receive the new territory and become the governor of the same when received. It must have afforded the general no little pleasure to return to Pensacola and bid a final farewell to the Spanish Dons as he received from them the country he had once taken by force of arms, and against the surrender of which he had vigorously protested.

The delivery of the Floridas was to be made in six months after the exchange of the ratifications of the treaty, or sooner, if possible. General Jackson left Nashville April 24, 1821, to carry out his commission, and was on the Florida border in about a week. He was too familiar with the Spaniard's ever-ready *hasta mañana* to expect an immediate fulfilment of the treaty, but this did not mollify the irritating influence which the numerous delays had upon his irascible temper. The transfer was finally effected at Pensacola, July 17, 1821, with some dramatic effect, by General Jackson and Don José Callava. Still further delay had been expected in East Florida, but the transfer there was effected a week earlier than at Pensacola, by Colonel Robert Butler and Don José Coppinger. Everywhere the Spanish claimed the cannon in the fortifications, but the Americans would not allow them to be carried off, and they were left for further negotiations. At St. Augustine the archives were left under the same conditions.[1]

The proclamation, furnished from Washington, issued by General Jackson was of the same general tenor as that published in Louisiana by Governor Claiborne.[2]

At the time of the transfer the population of Florida was very small. The only towns of any importance were Pensacola and St. Augustine. The former had the finest harbor in Florida and once enjoyed a considerable overland trade with St. Augustine, but its greatness had long since passed away. Its dignity now depended chiefly on the fact that the governor still resided there and kept a few troops with him to garrison Fort Barrancas, six miles distant at the entrance to the bay. Nearly all the houses were in a state of dilapidation, and hardly more than half were occupied. The government building, a frame structure propped up with unhewn timber, was considered unsafe. At St. Augustine some government buildings had been begun on a pretentious scale years before, but had been allowed to fall into decay.[1]

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[1] Niles, xx, 404; Ann. 17 Cong. 1 Sess., 1918, 1950.

[2] *Ibid.*, 1924 *et seq.*

The inhabitants consisted mainly of West Indian traders, smugglers, privateersmen, Indians, runaway negroes, and renegade white men from the States. In Mrs. Jackson's opinion the last two formed the worst element. The people did not observe the Sabbath according to her notions of propriety, the noise, swearing, and bustling trade being especially jarring to her nerves.[2] The general's report was slightly different. He found the inhabitants a sober, orderly, peaceable, and well-meaning people. His opinion of the Spanish population was favorable, "excepting of such as have been employed by the government, which seems to have had everywhere the same corrupting influence over the minds and morals of those engaged in its administration."[3]

Little needs to be said about the laws and political system beyond the statement that, theoretically, they were much like those of Louisiana. The political organization, however, was very defective. An elaborate system had been provided for in the Spanish constitution, which was proclaimed in Cuba[4] and Florida, but it never was put into full operation. Colonel Callava explained the defective organization by saying that, considering the probability of an early transfer of sovereignty, he had not thought it worth while to remedy the defect. The military officers often performed the duties of civil magistrates.

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[1] Ann., 17 Cong., 1 Sess., 1938; Forbes, *Sketches of Fla.* (1821), 87 *et seq.*

[2] Parton, *Jackson*, ii, 603 *et seq.*

[3] Ann., *ibid.*, 2539.

[4] Niles, xviii, 176.

At the time of his appointment, Governor Jackson was an officer of the army, but his commission expired June 1. After that date the commanding officer in Florida was directed to honor his requisition for such military assistance as might be necessary to enforce his authority.[1] The commission given to General Jackson as governor, authorized him "to exercise all the powers and authorities heretofore exercised by the governor and captain-general and intendant of Cuba, and by the governors of East and West Florida, within the said provinces, respectively," under such limitations as had been, or might be, prescribed by the President, or by law. The power to lay or collect any new taxes or to confirm any land titles was expressly denied.[2] The country was divided into three collection districts, and revenue officers were appointed for them. A list of these officers, together with another civil list, which included two "judges of the United States" and two Territorial secretaries, was sent to Governor Jackson,[3] presumably simply for his information, as they were appointed according to an act of Congress and he had no direct connection with, or control over any of them, except the secretaries.

The day after the transfer of sovereignty was effected, "Major-General Andrew Jackson, Governor of the provinces of the Floridas, exercising the powers of the Captain-

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[1] President's Message of April 5, 1822.

[2] Ann., 17 Cong., 1 Sess., 1922 *et seq.*

[3] *Ibid.*, 1927.

General," *etc., etc.*, proceeded to the business of legislation. The first act ordained that there should be appointed annually by the governor a chief officer, to be called the mayor, and six subordinate officers as councilmen, endowed with the powers necessary for the good government of Pensacola. They were to impose fines and levy such taxes as were necessary for the support of the town government. To remove doubts as to the powers of the mayor and council in regulating the observance of the Sabbath, they were expressly empowered to make proper ordinances for that purpose. The ordinance further prohibited, under severe penalties, public gaming-houses and public gaming of every description, except billiards. A similar inhibition was laid upon the sale of liquor to soldiers of the United States. Another ordinance prescribed certain quarantine regulations.[1]

At some time, probably before this, it occurred to General Jackson that it might be well to know something of the laws he had promised to maintain and of the machinery of the government he was expected to administer. On the way down he met Mr. H. M. Brackenridge, of Pennsylvania, a gentleman of some accomplishments, well versed in French and Spanish, and asked him to take part in forming the government.[2] Mr. Brackenridge was appointed alcalde of Pensacola, and was directed to investigate and report upon the Spanish law and political system.

But the governor was not idle while waiting for this report. July 21, he issued a decree dividing the territory into two counties, and ordering the establishment of county courts, with five justices of the peace for each. The proceedings in all civil cases were to be conducted according to the Spanish law, except in the examination of witnesses;

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[1] Ann., 17 Cong., 1 Sess., 2547 *et seq.*

[2] Parton, *Jackson*, ii, 615.

in criminal cases, according to the common law, that is, on indictment by a grand jury. Criminal trials were to be public, and by a jury of the county. The examination of witnesses was to be *viva voce* in open court. Indictments were to be made in the name of the United States. The judges were empowered to impose such taxes as were necessary to carry this ordinance into effect. Five days later another ordinance was promulgated explaining the method of procedure in the county courts, and fixing the fees to be received by their officers.[1]

In a few days Mr. Brackenridge was ready to report. According to this report there was, besides the governor, only one provincial officer, the alcalde, actually in the exercise of any civil functions. While the duties of this officer were defined by law, he had, in Florida, exercised some functions not strictly belonging to his office, such as chief of police, sheriff, superintendent and inspector of prisons, and notary public. Mr. Brackenridge's predecessor had summed it up by saying that the alcalde had more power than the governor. By the decrees of the Cortes, passed under the Spanish constitution, the viceroys and ultramarine commandants were limited to functions of a political and military nature, and the intendant to the management of the revenue. This was done in the expectation that they would be aided by other officers and tribunals, but, as a matter of fact, such officers were never appointed in Florida, and this left the civil administration, especially in the judiciary, very defective. There was at the time no authority in the province to decide a law-suit. The governor still exercised the powers of an admiralty judge, by virtue of what law was not known. It was the only judicial power exercised by him since the adoption of the constitution. In towns of less than one thousand souls, all the civil functions were generally discharged by the alcalde; in larger towns the constitution gave the right to a cabildo, or mayor and aldermen. To these Pensacola was entitled, inasmuch as it was a capital city. It once had a corporation, but this had fallen into disuse.

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[1] Ann. 17 Cong. 1 Sess., 2551, 2554.

In view of these facts, Mr. Brackenridge was at a loss how to proceed. To require an election for the cabildo he thought would be to require an impossibility, as there was no officer to hold an election, nor any way to find out the qualified electors. He was also at a loss to know whether he was to be governed by the Spanish laws in force before the promulgation of the constitution, or by those passed since that period. If by the latter, to what period were those decrees to be considered in force; to the ratifying of the treaty, to the present time, or until the establishment of a government by act of Congress? It might, perhaps, admit of a doubt whether the Constitution of the United States did not extend its authority over this country by virtue of its coming under the American government; if so, that would secure to American citizens an open and public trial by jury. In completing the organization he thought that the interests of the Americans, who already outnumbered the Spanish, should be considered.[1]

The Spanish organization in East Florida was not quite so defective. Besides the governor, there were an alcalde, a cabildo, and a judge, all in the exercise of the functions of their offices. Governor Jackson directed that they should not be disturbed, if they were of good moral character and would take the necessary oaths of office. Captain Bell was commissioned to act as governor pending the arrival of Mr. W. G. D. Worthington, commissioned Secretary and

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[1] Ann., 17 Cong., 1 Sess., 2540 *et seq.*

Acting Governor of East Florida, and was directed to appoint new officers in all cases where the incumbents refused to take the necessary oaths.[1]

II. Review of the Governor's Action

In justification of his course, Governor Jackson said (July 30): "The commission under which I act does not define my powers; and, I assure you, I am not a little at a loss when left to collect them from the nature of the office. Judging from the practice in Spanish colonies, the viceroy, or captain-general, possesses legislative as well as executive powers over the provinces placed under his government. O'Reilly, in Louisiana, of his own authority, introduced the Spanish law, and established tribunals exactly modeled after those of Spain. But, according to the decrees passed under the constitution, those officers are strictly confined to the exercise of military and executive or political power. . . . In this uncertainty, I have contented myself with merely organizing a government from the materials at hand, with as little change as possible; promulgating the same by way of ordinance, in order that the people may have some knowledge of the system to which they must conform. These ordinances I now transmit for the approval of the President." [2]

The legal justification of the governor's acts depended on what laws were in force in Florida. In his proclamation the general had promised to preserve the local laws and institutions. The Spanish constitution [3] had been proclaimed in Florida, but he afterwards found it convenient to deny that it had any force there. We have met the statement that public law ceases to be operative upon the transfer of sovereignty. This statement must be qualified to mean such public law as defines the relations of subject and sovereign. It certainly will not be contended that the body of public law which provides the machinery of local administration ceases with the transfer of sovereignty, for that would leave the country in a state of anarchy. So much of the Spanish constitution, then, as defined the relations of the inhabitants of Florida to the Spanish sovereign ceased with the transfer, and only this. The rest of it, which was concerned with local organization and defined private law relations, so far as not contrary to our own laws, remained, or ought to have remained, in full force until changed by the new sovereignty. Governor Jackson was not the sovereign. The laws relating to local organization and administration had not, indeed, been put into full operation in Florida, owing to the negligence of the Spanish officials, who excused themselves by reference to the impending transfer, but this did not alter their binding force.

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[1] Ann., 17 Cong., 1 Sess., 2029. [2] *Ibid.*, 2537.

[3] This lengthy document may be found entire in Niles, xviii, 196 *et seq.*

For the government to limp along in the maimed condition in which he found it seemed intolerable to Governor Jackson. He began the process of healing by appointing an alcalde, an office made elective by the constitution (Art. 312). The same was true of the aldermen (regidors). The municipal councils were to be established by the provincial council, which latter body also was elective. The direction as to how justice should be administered was left to the Cortes. General Jackson said that his ordinances made known the rules rather than prescribed new ones, except the requirement for pronouncing decrees in open court and the giving of testimony *viva voce*. The statement may be true in part, but it is open to doubt. Mr. Brackenridge said that the judge, according to Spanish law, regulated his own charge for an order or decree, and that whatever the theory, the practice in Florida had depended on the individual in office. If this was the law, General Jackson had changed it in himself fixing the scale. But Mr. Brackenridge was wrong. Under the constitution (Art. 256) the fees were to be fixed by the Cortes. The governor said that trial by jury, which he had decreed, was in the contemplation of the Spanish constitution, as well as that of the United States. A careful examination of the former document hardly justifies this claim.

The clause in the first ordinance giving the town council power to make such regulations as they deemed proper for the observance of the Sabbath was afterwards attacked by the general's opponents as violating, or authorizing the council to violate, the treaty and his commission, by which he was bound to protect the people in the free enjoyment of their religion. The council might even deem it proper to close the Catholic church.[1] This charge was really too silly to deserve notice. Such powers were not supposed to rise superior to statute regulations of superior authority. The ordinance simply meant, says Parton, that Mrs. Jackson wished, and Governor Jackson ordained, that the theatre and gambling-houses be closed on Sunday. And this was done. The taxes authorized to be levied by the council, said the governor, were such as had usually been paid.

While complaint was frequently made about the defective organization, little was said about a lack of Spanish law on the subject. The general probably had a copy of the constitution. If not, it was his own fault, for it had been published in English in the United States nearly a year before he started for Florida. Mr. Brackenridge furnished him with a copy of the laws regulating alcaldes. These laws had been passed under the constitution in 1812, and, upon its restoration, were, with other laws passed under it, revived.[1] But these the governor deliberately disregarded, in spite of the promises in his proclamation.

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[1] Parton, *Jackson*, ii, 608.

His justification for this was that "the greater part of the population of this country are Americans; the active commerce is carried on by Americans; hence the necessity of assimilating the present institutions to something which they can understand, and of administering the laws by means of tribunals not altogether foreign to their habits and feelings."[2]

If, as claimed, the Americans already outnumbered the Spanish (in Pensacola), it would not have been contrary to justice to give them no small share of the offices, provided they were *bona fide* residents, especially as the government was ultimately to be assimilated to the American system. Yet Governor Jackson says that, in making up his civil list, he was desirous to give preference, where possible, to the old inhabitants. However, he found but few willing to accept any situation, owing to their unwillingness to lose their rights as Spanish subjects. The governor attributed this to the fact that the greater part had been connected with the government in some way, or that they had private claims which might be prejudiced by any act evincing their intention to become American citizens.[3] The first reason seems incredible, in view of the fact that he found it necessary to have a special commissioner search for the government!

Attention has not been called to these irregularities because they prove that the general was guilty of high crimes and misdemeanors. There was, indeed, no legal excuse for them, for he was bound, both by his commission and the law of nations, to preserve the existing municipal regulations. He was not the new sovereignty authorized to change them, nor could he do it under his commission as captain-general, that office having been stripped of legislative powers. But the changes were bound to come, and then probably was the best time to begin. The chief lesson, then, lies in the warning against making promises the meaning of which is not known, and against sending out governors to strange situations with powers so hedged about as to render their office a nullity, if the limitations be observed.

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[1] Ann. 17 Cong. 1 Sess., 2547. [2] *Ibid.*, 2537. [3] *Ibid.*, 2539.

CHAPTER V

ADMINISTRATIVE WORK IN FLORIDA

I. THE CALLAVA-FROMENTIN AFFAIR

WE now come to one of the most serious, and at the same time the most ludicrous, of the acts committed by Governor Jackson during his stay in Florida.

August 21, 1821, Mr. Brackenridge, the alcalde of Pensacola, informed Governor Jackson that he had satisfactory evidence that important documents relating to estates which belonged to his office were in the possession of a Spaniard named Sousa, and requested authority to make a regular demand for them.[1] The governor immediately granted the request, and appointed George Walton, Secretary of West Florida, H. M. Brackenridge, and John Miller, county clerk, a committee to make the demand. When these gentlemen called upon Sousa, he produced several boxes of papers and allowed them to be examined. Among these the committee found four sets of papers relating to property which they considered of importance and demanded their possession. This Sousa refused on the ground that he was the servant of the late Governor Callava, and could not surrender the papers without an order from him. The committee then wrote out a statement for Sousa, saying that they regarded him only as a private person, with no authority to retain the documents, and again demanded possession. This communication he refused to receive.

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[1] Ann. 17 Cong. 1 Sess., 2301 *et seq.*

When the situation was reported to the governor, he ordered Colonel Butler, of the army, and Mr. Miller to seize Sousa, together with the papers, and bring him before the governor for examination. In a short time they produced Sousa, but reported that he had carried the papers to Callava's house to relieve himself of the responsibility for them. Sousa was now committed for contempt, and an order was issued to the military to secure the papers from Callava, or to take him into custody.

Colonel Callava was soon found, but refused to deliver the papers, and asserted his rights to immunity as a commissioner of Spain. After a considerable parley, he was taken in charge and carried before Governor Jackson. The statements of the two parties to this affair were diametrically opposed. The colonel declared that he was treated throughout with the utmost discourtesy and contempt. On the other hand, Mr. Brackenridge declared that Colonel Butler, who had charge of the military, used the utmost delicacy. Both were supported by "many respectable witnesses."

About ten o'clock at night Colonel Callava was carried before Governor Jackson, now sitting in his judicial capacity. The colonel refused to answer any questions relating to the papers, and protested against the proceedings as a violation of his rights. Whereupon the judge informed him, with considerable warmth, that such pretensions could not be allowed. Callava's ire also warmed up and he only remained the more obstinate. His steward, Fullarat, was then questioned, and answered that his master had the papers desired. Judge Jackson now offered to send an officer with any one Callava might name to bring the boxes, in order that they might be opened and the papers specified taken out. After repeated refusals, the colonel ,and his steward both were committed to prison about midnight.

In both instances he complained of bad interpretation, but there can be no doubt that he understood very well what was wanted.

The next day the papers were taken out and the box resealed. Thereupon an order was issued for the release of the prisoners. During all this time Colonel Callava's house was carefully guarded by a squad of soldiers. When he returned he found nothing to complain of except that the documents so often demanded had been taken away.

But before the curtain was rung down upon this act by the release of the prisoners, another actor was heard approaching behind the scenes. This was none other than Eligius Fromentin,[1] "Judge of the United States for West Florida, . . . empowered to execute and fulfil the duties of that office according to the Constitution and laws of the United States."

Finding their companion in prison, some of Colonel Callava's friends applied to the above-named judge for a writ of *habeas corpus* in his behalf. This was soon issued, and

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[1] A little knowledge of this man's antecedents may add something to our understanding of the situation.

Eligius Fromentin was a native of France, was educated in a Jesuit college, and entered the priesthood. Being expelled from France during the Revolution he came to America. Soon after he married into an influential family in Maryland, acquired a smattering of law, and began to practice in New Orleans. Education, suavity of manner, and family influence finally raised him to the dignity of a United States Senator. When the Bourbons were restored he abandoned his wife and returned to France in the hope of ecclesiastical preferment. Disappointed in his expectations there he returned to America, but his prospects were now ruined at New Orleans. His wife accepted his explanations and again lived with him. It was largely through the influence of her family that President Monroe, ignorant of his true character, appointed him to the temporary judgeship in West Florida, thereby rejecting General Jackson's application for one of his friends.—Parton, *Jackson*, ii, 616 *et seq.*

Lieutenant Mountz was directed to produce the body of the prisoner. But instead of doing this the lieutenant handed the writ to Governor Jackson, who immediately cited Judge Fromentin to appear before him and explain why he had attempted to interfere with the governor's authority. The judge accordingly appeared and signed a statement that he had granted the writ without any affidavit, merely upon the verbal application of a number of gentlemen, among them Mr. Innerarity, and that it had been delivered to one of the applicants to be served upon Lieutenant Mountz.[1] This acknowledgment, together with what was said orally, was considered a sufficient apology, and the judge was released with a lecture on his duties and prerogatives, and a threat of imprisonment for a repetition of the offense.

One more act and the central part of the tragi-comedy closes.

Soon after his release, Colonel Callava started for Washington to lay his grievances before the Spanish minister. Certain Spanish officers, eight in number, who remained behind, published a criticism of Governor Jackson's course in dealing with the colonel, in which they "shuddered at the violent proceedings exercised against their superior." As Governor Jackson considered the language of their statement offensive and believed them to be sowing discontent in the minds of the good people of the province, he ordered (September 29) them to depart before October 3, which they ought to have done long before, conformably to the seventh article of the treaty.[2]

Another paragraph may be added here to give the sequel to the above, though General Jackson was not directly concerned in it. In January of the following year two of these officers returned to Florida, and were promptly arrested by Colonel George Walton, Secretary and Acting Governor of West Florida, although they declared that they had not returned in defiance of the proclamation, but had come to ask permission to attend to the settlement of their private affairs, and that they were ready to submit to any order which might be made in their case. The calaboose not being fit to receive them, they were simply confined to their own houses while the matter was reported to General Jackson, and through him to Washington. When President Monroe heard of the situation he ordered their release.[1]

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[1] Ann. 17 Cong. 1 Sess., 2318 *et seq.*, 2374.

[2] *Ibid.*, 2327.

II. THE HEIRS OF VIDAL *vs.* INNERARITY

The papers which had caused all this trouble related to the case of the Heirs of Vidal *vs.* Innerarity. The case arose in the following way:

Nicholas Maria Vidal, auditor of war, died in Pensacola in the year 1806. His will was found in New Orleans. This document directed that his debts, which were considerable, should first be paid, after which any residue of property should fall to some mulatto women, who were his children. The case had been in the courts ever since and was not yet settled, though numerous decrees had been issued. In August, 1821, the heirs appeared before Governor Jackson and prayed that John Innerarity, who, as counsel for a firm concerned in the settlement, had been possessed of some of the estate, be commanded to render an account in obedience to a decree to that effect issued by Governor Callava, July 1, 1820. At the same time they expressed the belief that he was about to withdraw his person and effects from the jurisdiction of Pensacola. The chief claimant,

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[1] Ann. 17 Cong. 1 Sess., 2038 *et seq.*

Mercedes Vidal, affirmed that the will and inventories had been missing for several years from the public archives of Pensacola, that she had made repeated applications to have them restored, and that this was finally done under a decree. That just before the change of sovereignty she had demanded them of Colonel Callava, but that he refused, saying that he must take them to Havana.[1]

While Governor Jackson was aware that much corruption characterized the Spanish judicial proceedings, he was horrified at this unparalleled wickedness. He was fully satisfied that Colonel Callava had been bribed by Innerarity.[2] Such oppression must not be tolerated, and the papers were sought, with the result already described.

The case was now called up before Governor Jackson, sitting as a court of chancery. Counsel for the defendant entered a plea of want of jurisdiction, because, by the Spanish constitution, the judicial authority once exercised by the governors had been taken from them and vested in other officers. In rebuttal, the attorney for the plaintiff held that the powers executed by the officers of Spain, not the officers, were retained by the act of Congress, and that the President, in conformity to that act, had made an entirely different distribution of them. The Spanish constitution was not in force in Florida, because it had not been promulgated until Spain had parted with the sovereignty of the territory. Besides, it merely provided a form of government, and consequently had no application to the new government. An examination of the act of Congress and of the governor's commission showed that the President had intended to give him the same powers as had been exercised by Governor Claiborne in Louisiana. Under the Spanish constitution the governors of Florida were only military officers under the captain-general of Cuba. To reduce the governor to that position now would leave the country without government of any kind.[1]

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[1] Ann. 17 Cong. 1 Sess., 2414, 2417, 2360.

[2] *Ibid.*, 2298 *et seq.*

Counsel for plaintiff was sustained by Governor Jackson, who said that the plea of the defendant would fall upon proof that the Spanish constitution was not in force in Florida. This he then endeavored to prove. It was first promulgated in Spain, said he, not in the provinces, by the Cortes in 1812, while Ferdinand VII. was a prisoner. May 4, 1814, the king, who had returned to Spain, annulled all the decrees of the Cortes, and this was the situation when the treaty was concluded, February 22, 1819, by which Spain parted with the sovereignty of the Floridas. The ratification was delayed two years, but in the ratification, assented to by the Cortes, it was provided that the treaty should have the same effect as if it had been ratified within the time originally specified. As there was no constitution in existence in 1819, this would exclude that document from the Floridas. Besides, the constitution was not promulgated in Cuba until January, 1821, and if ever in Florida, certainly after that date, more than three months[2] after Spain had surrendered the sovereignty of Florida. The plea of the defendant, therefore, was overruled, and he was ordered to show why the decree of the late Governor Callava, by which he had been ordered to render to the heirs of Vidal an account of how the estate had been handled, should not be carried out.[3]

The defense now brought forward decrees of the courts down to 1810, by which the estate was supposed to have been finally settled, leaving it indebted to the defendant for $157.[1] But several of the claims made therein were not allowed by this court, and the defendant was ordered to pay over the sum of $1,027.19 to the alcalde within thirty days. The alcalde was to advertise that creditors would be allowed sixty days in which to file their claims, after which the residue should be turned over to the heirs of Vidal.[2]

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[1] Ann. 17 Cong. 1 Sess., 2328 *et seq.*

[2] Presumably referring to the ratification by the king of Spain, October 24, 1821.

[3] Ann. 17 Cong. 1 Sess., 2332 *et seq.*, 2416.

At the expiration of the sixty days, the counsel for defense endeavored to get a review of the whole case, but Colonel Walton, Acting Governor, paid no attention to his plea, but gave him to understand that the money must be forthcoming unless he wanted to go to prison.[3]

III. Opinions and Counter-Opinions

Several questions arose in connection with the foregoing proceedings which deserve further notice. Colonel Calava's claim to the disputed papers may be disposed of first.

This claim was based on the fact that Vidal was in the military service. For that reason the papers fell under the military court and captainship-general, which, by the evacuation of Florida, had resumed the authority of the Spanish government of Pensacola. Besides, the creditors of the estate were Spaniards, and the right of presenting their claim in the proper tribunals could not be denied them. So far from attempting to wrong any one, he had ordered the papers to be given to the mulatto, that she might make a copy.[4]

It was not denied that the property involved was within the jurisdiction of the United States, and that the claimants were presumptive, or at least prospective, citizens of the same. To say, then, that the estate should be administered by a Spanish court for the benefit of Spanish creditors was a claim too absurd to be noticed.

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[1] Ann. 17 Cong. 1 Sess., 2476.

[2] *Ibid.*, 2457.

[3] *Ibid.*, 2036.

[4] *Ibid.*, 1969.

When Mr. Salmon, Spanish chargé d'affaires at Washington, heard of the treatment meted out to Colonel Callava, he at once lodged a protest with Secretary Adams. In every way, he declared, the proceedings of General Jackson were irregular, illegal, unconstitutional, and violent. Both the American and Spanish constitutions, which guaranteed to every individual his property and person, had been violated in the informal process and inhuman execution of the decrees relating to Colonel Callava, even when he was regarded as a private individual. But he was, in fact, a commissioner of his Catholic Majesty for carrying into effect the treaty, and as such was under the protection of the law of nations.[1]

The reply of Secretary Adams was marked by the vigor usually found in his state papers. Colonel Callava's claim to exemption as a commissioner was inadmissible. The treaty provided that the surrender should be made and the evacuation accomplished in six months. The surrender had been made and the six months had passed. Spanish officers who remained after that date were there on sufferance, and were, according to the Spanish laws existing before the cession, liable to removal or imprisonment, at the discretion of the governor, for the mere fact of being there. Colonel Callava's act was an undisguised effort to prostrate the authority of the United States in the province; Governor Jackson had to pursue the course adopted, or else see the sovereign power of his country trampled under foot and exposed to derision by a foreigner remaining there only upon his sufferance.[2]

The expulsion of the Spanish officers called forth another note from Mr. Salmon. He maintained that General Jackson's charges were false and that the expulsion disregarded the laws, and also the respect due to a friendly power.[1]

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[1] Ann. 17 Cong. 1 Sess., 1959 *et seq.*, 2010.

[2] *Ibid.*, 2006, 2045.

The secretary's reply was not less pointed than polite. The charge of falsity he hoped had been admitted inadvertently to the communication he had received. The officers ought to have departed in accordance with the provisions of the treaty; having remained they were subject to removal, even if guilty of no offense whatever. Simple expulsion was the most lenient penalty General Jackson could inflict for the offense of which they were guilty.[2]

When Judge Fromentin learned that Governor Jackson had used the word apology in connection with the statement he had signed in regard to the issuance of the writ, a breezy correspondence ensued between them, the gist of which was: "I didn't." "You did." "I did." "You didn't." Both then poured their troubles into the ear of the Secretary of State.

From the very first they had disagreed as to the extent of the judge's jurisdiction. Governor Jackson held that Judge Fromentin was limited to cases arising under the two laws of the United States which had been extended to the territory, those relating to revenue and the importation of slaves. The judge himself maintained that he was a territorial judge, with the additional jurisdiction vested by the act of March 3, 1805, in such judges where no district court of the United States had been established. He was confirmed in this opinion by an examination of his commission, in which he was styled a "judge of the United States for West Florida, with power to execute and fulfil the duties of that office according to the Constitution and laws of the United States," and by a sentence in the Secretary's letter transmitting the commission, in which he said that it might be important to have the judicial department of the temporary government under General Jackson put into operation immediately.[1] But the governor had forestalled him, and had the judiciary in operation when Judge Fromentin arrived. While he was waiting to hear from Secretary Adams, the troubles recited above occurred. The question of jurisdiction was now overshadowed by that of the judge's right to issue the writs of *habeas corpus*.

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[1] Ann. 17 Cong. 1 Sess., 2009 *et seq.*

[2] *Ibid.*, 2049.

Governor Jackson did not trouble himself to enter upon any arguments respecting the judge's right. With his interpretation of the judge's jurisdiction it was assumed that the right to issue the writ fell to the ground. The irregular way in which the writ had been issued was, he declared, enough to strike him forever from the roll of judges, unless ignorance of the law was no bar to judicial station.[2]

A considerable part of the judge's letters was taken up with a denial that he had ever apologized to Governor Jackson. The spectacle of the courts set up by the governor deciding—not trying—cases every day, *coram non judice*, and the governor himself engaged in the same business, all of which the judge considered without a shadow of legality, fairly set his blood to boiling. He waxed eloquent over the " revolting system of inquisition " which prevailed there, and declared the despotism of Morocco and Algiers to be preferable to the existing government in Florida. When Secretary Adams sustained Governor Jackson's interpretation of the judge's jurisdiction—nothing was said about the right to issue the writ of *habeas corpus*—the excitable Frenchman went into hysterics, and delivered himself of a lengthy " exposition," setting forth the reasons for his view of the situation, and still declaring that he would continue to consider himself the only judge in Pensacola. The thought that he was to be denied the right to issue the writ of *habeas corpus* seemed unendurable and drew from him an apostrophe to liberty. The people of Florida had been stripped of their liberty and subjected to Jacksonianism, a term which henceforth would be more odious than ever tyrant had been. But he would not tamely submit. If not allowed to introduce the *habeas corpus*, that "legitimate knight of American liberty," under the protection of the Constitution of the United States, he would introduce it under that of Spain. *Flectere si nequeo superbos, Acheronta movebo.*[1]

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[1] Ann. 17 Cong. 1 Sess., 2374 *et seq.*

[2] *Ibid.*, 2300, 2340.

The judge's claim that he was a territorial judge, in opposition to the views of President Monroe and Secretary Adams, who issued his commission, merits but little attention. By his commission he was denominated a "judge of the United States for West Florida," with power to execute the same "according to the Constitution and laws of the United States." This does not look much like the commission of a territorial judge. Indeed, it would be difficult to say what it does look like. It is immaterial to inquire whether he had the same right to issue the writ of *habeas corpus* as belonged to the district courts of the United States, conferred upon them by name in the statutes creating them, for, in any case, he had no right to issue it against Judge Jackson in a case in which the United States was not concerned.

However, in palliation of Judge Fromentin's conduct, it may be said that the last sentence in Secretary Adams's letter transmitting the commission was a little confusing: "Towards the organization of the temporary government under his [Jackson's] direction, it may be important that the judiciary department should be put into operation immediately." But a "judge of the United States" can have nothing to do with the judiciary of a territory.

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[1] Ann. 17 Cong. 1 Sess., 2400, 2463 *et seq.*

Governor Jackson's misstatement of fact in regard to the promulgation of the Spanish constitution gave Judge Fromentin an opportunity to excoriate him unmercifully. The judge declared that he held in his hand an official copy of the oath administered to Governor Callava, May 26, 1820, when the constitution was promulgated at Pensacola. Many citizens were ready at the trial to testify that this had been done in the midst of rejoicings and illuminations lasting several days, but every application for such testimony had been overruled. General Jackson, then, in Fromentin's opinion, had deliberately stated a falsehood.[1]

The line of reasoning by which the general satisfied himself that the Spanish constitution was not in force in Florida was more worthy of a Greek sophist than of an American statesman or general. That a sovereign cannot legislate for territory ceded by a treaty signed, but not ratified and exchanged, is a proposition too absurd to be discussed.[2] It probably would not have occurred to anybody else that that clause in the ratification which provided that the treaty should have the same effect as if it had been ratified within the time originally specified, was meant to annul all laws passed for the regulation of the territory since February 22, 1819. The argument adopted by counsel for the heirs of Vidal—that the powers of the existing government had been retained, not the officers (meaning offices), of which a new distribution had been made—would have justified the governor in sitting as a judge but for the fatal wording of his commission, by which he was limited to the powers and authorities exercised by the governor and captain-general and intendant of Cuba, and by the governors of East and West Florida. The only reasonable interpretation of this is that it meant the powers exercised at the time of the transfer. Now the governor's own alcalde, Mr. Brackenridge, had informed him that the only judicial power exercised by the governor since the promulgation of the constitution related to admiralty. A legal justification, then, of the governor's judicial proceedings seems to be wanting. Nor does the necessity for them appear to have been imperative. He had already organized some courts; if they were inadequate, why not others? The constitution appears to have left the direction as to how these should be organized to the Cortes. The law of that body on the subject is not known to the writer, but it must have been competent for the governor to bring about their organization in some way, probably by election on Sunday, after high mass, as in the other elective offices.

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[1] Ann. 17 Cong. 1 Sess., 2410.

[2] *Ibid.*, 2027.

The conduct of General Jackson in Florida attracted the attention of Congress, and the House of Representatives, after a considerable debate, which trenched upon the merits of the case, called upon the President for information in regard to it. When the correspondence was received it was laid on the table and ordered to be printed. A series of resolutions arraigning the general administration of Florida and declaring the treatment of Colonel Callava to have violated the laws of nations, and that of Judge Fromentin a proceeding not warranted by any legal authority, was refused consideration.[1]

The country, says Parton,[2] judged the governor leniently, though some papers were severe in their criticism. Parton himself is a little severe, but he lays the blame on old prejudice (against the Spanish), and chronic diarrhœa, which made the general irritable. "Nevertheless, after giving due weight to these extenuating circumstances, many readers will feel that General Jackson's treatment of Sousa, Callava, and Fromentin was only saved from being atrocious by being ridiculous."

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[1] Ann. 17 Cong. 1 Sess., 610 *et seq.*; 627, 1195.

[2] *Jackson*, ii, 642.

IV. East Florida and Other Affairs

The question of religious toleration appears to have been the first one to present itself in East Florida, but it was settled without so much as an appeal to the officials. Hardly had the substitution of flags been effected when a Methodist minister appeared and began to distribute Protestant tracts. This called forth an indignant protest from a Catholic priest, but when the preacher pointed to the American flag the priest retired in dismay.[1]

While Captain Bell was acting-governor he "found it necessary, in the absolute want of all law regulation, police or magistracy, to exercise his authority, upon the occurrence of some peculiar circumstances respecting the carrying off of slaves, to confine for a very short time one of the citizens in the fort of Saint Augustine."[2] In doing this the captain said that he did not deem it necessary to ascertain with legal precision whether his powers were to be measured by the limits imposed by the old or new constitution of Spain, but that the good of all, the peace of the whole community, was his only rule of conduct. This occurred only a few days after the transfer of sovereignty. The extent to which the civil power was allowed to supersede the military, even before the organization of the territorial government under the act of Congress, is illustrated by the fact that in about five months damages were awarded against Captain Bell by the county court, and that its decision was acquiesced in. However, the "inhabitants and proprietors" of St. Augustine raised the amount of the fine, and begged of Captain Bell the privilege of paying it as a testimonial of their esteem and their unshaken belief in the uprightness of his conduct.[1]

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[1] Parton, *Jackson*, ii, 608I.

[2] Vignoles, *Observations upon the Floridas* (1823), 30.

Mention has already been made of the fact that the archives were left in the hands of the Spanish. When Mr. Worthington arrived he deemed the immediate possession of these papers of sufficient importance to demand their delivery, according to the terms of the treaty. They were in the hands of a Mr. Entralgo, the Spanish alcalde, who continued to exercise the functions of that office and receive the fees, although he had refused to take the oath of allegiance to the United States. Secretary Worthington now appointed Mr. Edmund Law to be alcalde, and demanded possession of the archives and office. This Mr. Entralgo refused, saying that they were his private property, as he had bought them at a public sale, and that he would not part with them until satisfactorily indemnified. The secretary replied that he must seek indemnification from the government which had sold him the office. Upon his persistent refusal, the secretary sent three men as a commission, with authority to call upon the military for help, to seize the documents in question. This brought about the desired result.[2]

Captain Bell, the president of the commission, reported that the conduct of the officers in seizing the papers was approved by citizens having property in East Florida.[3] Indeed, it was to allay their uneasiness that the prompt action was taken, for many feared that frauds would be perpetrated against property rights, if these papers were allowed to be shipped to Havana.

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[1] Vignoles, *Observations upon the Floridas* (1823), 31 *et seq.*

[2] Ann. 17 Cong. 1 Sess., 2512 *et seq.*

[3] *Ibid.*, 2018 *et seq.*

Governor Jackson approved these proceedings, declaring that " nothing could be more absurd than that Spanish officers, as such, should administer the government. The true meaning [of the proclamation] is, that whenever the incumbent will take the oath to support the Constitution of the United States, and abjure that of Spain, and take the oaths of office, he shall continue therein," subject, however, to removal at any time.[1]

In October of 1821, the city council of St. Augustine so far exceeded its authority in levying taxes upon the inhabitants that Congress took notice of the matter and annulled the ordinance.[2]

A few days after taking possession of Pensacola, Governor Jackson took an important step in regard to the sixth article of the treaty. It was nothing else than to prescribe the manner and limit the time in which the inhabitants were to elect their citizenship. Such as desired to become American citizens were ordered to appear and have their names enrolled in a register within twelve months, after which time all who had not so registered were to be considered as foreigners. The keeper of the register was allowed to exact one dollar for every name recorded, and his secretary another dollar for every certificate of citizenship issued.[3] His reasons for the requirement were: (1) For the convenience of such as desired to become citizens of the United States. (2) To prevent persons from claiming both the privileges of citizens and the exemptions of foreigners, as suited their convenience, of which he had had no little experience in Louisiana. But these reasons for usurping powers expressly delegated to Congress in prescribing rules of naturalization do not appear to have satisfied that body. May 7, 1822, the ordinance was annulled, and provision was made to reimburse any who had suffered in consequence of it.

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[1] Ann. 17 Cong. 1 Sess., 2027.

[2] Act of May 7, 1822.

[3] Ann. 17 Cong. 1 Sess., 2550.

V. DEPARTURE OF GOVERNOR JACKSON. EFFECTS OF HIS ADMINISTRATION

In a few weeks Governor Jackson had made more history for Pensacola than had before fallen to its lot in years. His administration was now drawing to a close. In obedience to the wish of Secretary Adams, he transmitted a report conveying such information as he thought would serve to enlighten Congress in legislating for the territory. As for government, he recommended an organization similar to that adopted for Louisiana.[1]

And now Governor Jackson, who had accepted the position with some reluctance,[2] disgusted with the whole business, and with health considerably impaired, prepared to return to his home in Tennessee. October 6, he sent to the *Floridian* an address to the people of Florida as a kind of parting message. In the organization and execution of the present temporary government he had, he affirmed, kept steadily in view the securing to the inhabitants the protection of their persons, property, and religion, as guaranteed by the treaty, until they should be incorporated into the Union and become entitled to all the privileges and immunities of citizens of the United States. In performing this important part of his functions he had endeavored to observe the spirit of our political institutions. During his absence Secretary

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[1] Ann. 17 Cong. 1 Sess., 2560.

[2] Monroe, Message of December 3, 1821.

Worthington would administer the affairs of East Florida, and Secretary Walton those of West Florida, subject to instructions from the President, through him.[1]

The next day the governor left for Nashville, where he arrived November 5. Shortly after this his resignation was sent in and accepted. The secretaries were left in charge, under the instructions given them by Governor Jackson, until Congress should make further provision.[2]

Judge Fromentin thought that General Jackson wished to exploit the offices in Florida for the benefit of his friends. Certain letters written by Mrs. Jackson while at Pensacola indicate that he was somewhat vexed at not being able to dispose of the more important offices, the President having made the appointments in Washington. But, in any event, it cannot be charged that he wished or attempted to exploit the Floridians simply for his own benefit, or that of his friends.

The ordinances for the government of Pensacola were reported by Mr. Brackenridge, a few days after their promulgation, to have been productive of the happiest results. Peace, quiet, and order had taken the place of continual disturbance and disorder. The military force was almost entirely dispensed with and its place supplied by civil officers. Attention to the health and comfort of the city had succeeded the total neglect with which these important considerations were treated for months before the change of sovereignty.[3] Mrs. Jackson was so annoyed with the boisterous way in which the Sunday preceding the transfer of sovereignty was kept that she sent Major Stanton to warn the people that the next would be differently kept. "Yesterday I had the happiness of witnessing the truth of what I had said. Great order was observed; the doors kept shut; the gambling-houses demolished; fiddling and dancing not heard any more on the Lord's day; cursing not to be heard." [1]

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[1] Niles, xxi, 171 *et seq.*

[2] Ann. 17 Cong. 1 Sess., 2039.

[3] Ann. 17 Cong. 1 Sess., 2541.

This same lady thought the change of sovereignty not so very welcome to the natives. "How did the city sit solitary and mourn!" she exclaims. But she was given to reflection and introspection, and wrote as though her impressions were received from gazing out of a window.

The Floridians had had some experience with General Jackson as a conqueror a few years before. This fact, together with stories which they had heard respecting his character, and his hatred for Spaniards in particular (which he denied), caused them to stand somewhat in awe of him. This was illustrated by an occurrence which happened shortly after his arrival in Pensacola. One night a fire broke out, and the Spaniards rushed out to witness it, but did nothing. When General Jackson arrived and took in the situation he uttered one of his fiercest yells to arouse them to action. The Spaniards, however, not comprehending the phrase employed, and having received impressions respecting the ferocity of his disposition which rendered him an object of terror, turned and fled, leaving him the sole spectator of the fire until the soldiers arrived.[2] His treatment of Colonel Callava and Judge Fromentin, and the expulsion of the Spanish officers, aroused some fear and excitement, but these soon subsided. The sense of humor must have prevailed over that of fear in the manager of the theatre who headed his play-bills, "Jacksonian Commonwealth." [3]

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[1] Parton, *Jackson*, ii, 604.

[2] *Ibid.*, 613.

[3] Ann. 17 Cong. 1 Sess., 2524, 2403.

VI. THE TERRITORIAL GOVERNMENT ORGANIZED

After the departure of Governor Jackson the secretaries seem to have had fairly smooth sailing. The House of Representatives again grew interested in their work, and asked the President "whether that portion of the United States army now in Florida is commanded by the officers of the said army, or by the secretaries of the territory; and if by the latter, by what authority he is invested with such command." In reply President Monroe said:

> . . . The secretaries of both the Territories have occasionally required and received the aid of the military force of the United States, stationed within them, respectively, to carry into effect the acts of their authority.
>
> The government of East and West Florida was, under the Spanish dominion, almost exclusively military; the governors of both were military officers, and united in their persons the chief authority, both civil and military.
>
> [The principle upon which the act for the temporary government of our new territory was carried into effect] was to leave the authorities of the country, as they were found existing at the time of the cession, to be exercised until the meeting of Congress, when it was known that the introduction of a system, more congenial to our own institutions, would be one of the earliest and most important subjects of their deliberations. From this, among other obvious considerations, military officers were appointed to take possession of both Provinces. But, as the military command of General Jackson was to cease on the 1st of June, General Gaines . . . received from me verbal directions to give such effect to any requisition from the Governor for military aid, to enforce his authority, as the circumstances might require.

The President furthed explained that the secretaries had no authority to command the troops, and that whatever aid had been required by them had been secured by written requisitions to the commanding officers. Colonel Brooks had written to know how far these requisitions were to be considered authoritative,[1] but the near approach of the reorganization of the government was considered a sufficient reason for giving no specific reply.[2]

The act for the organization of the territorial government became a law March 30, 1822. William P. Duvall, then "Judge of the United States for East Florida," was immediately commissioned governor of the new territory,[3] and with the organization of the new government under him in July, the quasi-military government came to an end.[4]

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[1] This officer had sided with Callava in his trouble with Governor Jackson.

[2] Message of April 5, 1822.

[3] Niles, xxii, 132.

[4] Niles, xxiii, 23.

BOOK II

MILITARY GOVERNMENT IN NEW MEXICO AND CALIFORNIA

CHAPTER I

THE OCCUPATION OF NEW MEXICO

I. The Conquest and Reorganization

MAY 13, 1846, the Congress of the United States declared that war existed with Mexico "by her own act." June 4, Mr. W. L. Marcy, Secretary of War, sent copies of a proclamation to General Taylor, who was already on the border, to be used by him according to his judgment. This proclamation assured the Mexicans that the United States only sought indemnity for past injuries and security for the future; that their purpose was not to make war on the people, but to liberate them from the tyrants who had usurped their government and destroyed their liberties. Nothing would be demanded of them except food for the army, which would be paid for in cash at full value. Such as remained neutral should be protected by the republican army of the Union.[1]

The instructions to Brigadier-General Kearny for the conquest of New Mexico and California were in keeping with the determination of the administration to obtain the "indemnity and security" just mentioned by taking permanent possession of those dominions. His orders, dated June 3, ran:

> Should you conquer and take possession of New Mexico and Upper California, or considerable places in either, you

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[1] H. Ex. Doc. 29 Cong. 2 Sess., no. 19, pp. 17 *et seq.*

will establish temporary civil governments therein—abolishing all arbitrary restrictions that may exist, so far as it may be done with safety. In performing this duty it would be wise and prudent to continue in their employment all such of the existing officers as are known to be friendly to the United States, and will take the oath of allegiance to them. The duties at the custom-houses ought, at once, to be reduced to such a rate as may be barely sufficient to maintain the necessary officers without yielding any revenue to the government. You may assure the people of those provinces that it is the wish and design of the United States to provide for them a free government, with the least possible delay, similar to that which exists in our Territories. They will then be called on to exercise the rights of freemen in electing their own representatives to the territorial legislature. It is foreseen that what relates to the civil government will be a difficult and unpleasant part of your duty, and much must necessarily be left to your own discretion.

In your whole conduct you will act in such a manner as best to conciliate the inhabitants, and render them friendly to the United States.

It is desirable that the usual trade between the citizens of the United States and the Mexican provinces should be continued, as far as practicable, under the changed conditions of things between the two countries. . . . .[1]

Similar instructions were sent to the naval commander. Copies of the proclamation sent to General Taylor were given to General Kearny also, but the next day he was requested not to use them in New Mexico and California, as parts of the proclamation would not "answer our purpose" in those countries.[2]

Such were the preliminaries to General Kearny's march of conquest. August 2, he sent Captain Cooke in advance to Santa Fé with a flag of truce to proclaim the purpose of his coming.[1] August 15, the general reached Las Vegas, where he explained to the people the object of the invasion, and assured them of protection in life and property so long as they remained quiet and peaceable. The alcalde, on taking the oath of allegiance to the United States, was confirmed in his office. At Tecolete similar proceedings were gone through with while the horses were being watered, and again at San Miguel. Exaggerated reports of General Kearny's strength caused the Mexican governor, Armijo, with about four thousand men, to retreat, and the Americans entered Santa Fé August 18, without opposition.

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[1] H. Ex. Doc. 29 Cong. 2 Sess., no. 19, p. 6.

[2] *Ibid.*, 18, 81.

The formal transfer of the city government was effected at the Palace, where the lieutenant-governor, Juan Bautista Vigil, met General Kearny for that purpose. The next day the American general assembled the people in the plaza and gave them some assurances through an interpreter. August 22, he issued a proclamation of a somewhat remarkable tenor. It recited that he came with instructions to respect the religious institutions of New Mexico, and to protect the persons and property of all quiet and peaceable inhabitants against their enemies, the Eutaws, the Navajos, and others. It continued:

> And he requires of those who have left their homes and taken up arms against the troops of the United States to return *forthwith* to them, or else they will be considered as enemies and traitors, subjecting their persons to punishment, and their property to seizure and confiscation for the benefit of the public treasury.
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> It is the wish and intention of the United States to provide for New Mexico a free government, with the least possible delay, similar to that in the United States; and the

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[1] Prince, *Hist. N. Mex.*, 290 *et seq.*

people of New Mexico will then be called on to exercise the rights of freemen in electing their own representatives to the Territorial legislature. But until this can be done, the laws hitherto in existence will be continued until changed or modified by competent authority; and those persons holding office will continue in the same for the present, provided they will consider themselves good citizens and are willing to take the oath of allegiance to the United States.

The United States hereby absolves all persons residing within the boundaries of New Mexico from any further allegiance to the republic of Mexico, and hereby claims them as citizens of the United States. Those who remain quiet and peaceable will be considered good citizens and receive protection; those who are found in arms, or instigating others against the United States, will be considered as traitors, and treated accordingly.

Don Manuel Armijo, the late governor of this department, has fled from it . . . for the present the undersigned will be considered as governor of the Territory.[1]

In a few days the new governor began to exercise his functions by repealing the law which required the use of stamped paper, by fixing the cost of licenses for stores, taverns, balls, *etc.*, and by laying duties on wagons, the revenue from which licenses and duties was to accrue to the city. The treasurer and collector having become incapacitated, the former through sickness, the latter through deafness, were removed and their places supplied by new appointments. He then, "being duly authorized by the President of the United States," proceeded to organize a civil government by the appointment of a full list of officers, and, September 22, 1846, proclaimed the same, together with an "Organic Law of the Territory," from the old Adobe Palace.

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[1] H. Ex. Doc. 29 C. 2 S., no. 19, pp. 20 *et seq.*

The document just mentioned began: "The government of the United States of America ordains and establishes the following organic law for the Territory of New Mexico, which has become a Territory of the said government." Then followed a transcript of the Organic Law provided by Congress for the Missouri Territory. After this came forty pages of laws for the government of the territory. These were compiled by Colonel A. W. Doniphan and a private, Mr. W. P. Hall, who received notice of his election to Congress from Missouri while engaged on the work. The compilation was made from the laws of Mexico, modified to conform to the Constitution of the United States, and from the laws of Missouri, Texas, and Coahuila, the statutes of Missouri, and the rest from the Livingston Code. These, among other things, defined crimes and fixed their punishment, provided for the administration of justice, with trial by jury, prescribed the fees, and introduced the *habeas corpus*. Nearly three pages were devoted to revenue regulations. An election was to be held on the first Monday in August, 1847, for a delegate to Congress, and for members of the general assembly.[1]

Meanwhile the executive and judicial officers were appointed and entered upon the discharge of their duties. The governor, secretary of state, the judges of the supreme court (three), the United States attorney and marshal, eight prefects, the speaker of the assembly, and the members of the legislature (twenty-one) were to be paid by the United States; the auditor, treasurer, attorney-general, and two district attorneys were to receive one-half of their salaries from the United States and the other half from the territory.

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[1] H. Ex. Doc. 29 C. 2 S., no. 19, p. 26 *et seq.*

II. THE CONQUEST IN CONGRESS. ACTS OF THE CONQUEROR REVIEWED.

When the news of General Kearny's high-handed proceedings was received in Washington, General Scott wrote him (November 8) a letter of commendation, with further instructions regarding operations in California. This letter contained one paragraph which might have been construed as disapprobation: "As a guide to the civil governor of Upper California, in our hands, see the letter of June the 3d (last) addressed to you by the Secretary of War. You will not, however, formally declare the province to be annexed. Permanent incorporation of the territory must depend on the government of the United States."[1]

In his annual message (December 8), President Polk said that the right of a belligerent, recognized in the laws of nations, to govern conquered territory during his military occupation had been exercised by our military and naval commanders in "the establishment of temporary governments in some of the conquered provinces of Mexico, assimilating them, as far as practicable, to the free institutions of our own country."

As soon as the motion to print the message had been disposed of, Mr. Garrett Davis, of Kentucky, rose and observed that there was one point in the message which he did not consider sufficiently explicit. He then asked leave to introduce a resolution calling upon the President for copies of all orders and instructions given to the military and naval officers in relation to the establishment or organization of civil governments in any portion of the territory of Mexico which had been, or might be, taken possession of by our forces; also for information as to what forms of government such officers had established, and as to whether the President had approved and recognized said governments.[1]

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[1] H. Ex. Doc., 29 C. 2 S., no. 19, p. 14 *et seq.*

Nobody appears to have had any special objection to the motion, but a spirited debate at once arose on it and lasted nearly two days. The speeches, some hysterical, some angry, some a bit humorous and sarcastic, included a great variety of subjects, ranging from the boundary of Texas and the right of annexation by treaty, by joint resolution, and by proclamation, to the powers of the President under the Constitution and the laws of nations. The last question was so mixed up with that of annexation and naturalization by the act of a commanding general that it is a little hard to get at the real merits of the debate.

Mr. Davis started off with pyrotechnics. What! Was our American President an emperor, sending forth his Agrippa and Marcellus as his proconsuls to conquer and govern by force of arms? Was he, an officer deriving his breath and being from the Constitution, to authorize his satraps and tetrarchs to set up governments and make laws at their pleasure? The country should be informed whether these things had been done with his sanction. Some had spoken of the government as military. Would any one refer him to a book of established authority which declared that the President might establish a temporary government in a conquered province while holding it in military occupation pending a treaty on the subject of boundary?

Mr. Douglass, of Illinois, saw no reason why the gentleman from Kentucky should not be enlightened on the subject concerning which he grovelled in such profound darkness. General Kearny, under the laws of nations, had a clear right to do what he had done, whether so ordered by the President or not. The country was ours by conquest;

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[1] *Globe*, 29 Cong. 2 Sess., 12.

his proclamation had merely announced that fact. If we should conclude a treaty with Mexico without boundaries, all these territories would remain a part of the territory of the United States. The establishment of a civil government was necessary for the protection of the inhabitants.

Mr. Rhett, of South Carolina, maintained that the President's power to govern conquered territory was plenary, subject only to moral and international law. *Sic volo sic jubeo* was his rule. This did not apply to territory within the limits of the Union. But California [1] and New Mexico were not any part of the Union—the Constitution did not extend over them. Mr. Davis here interrupted to say that both had been proclaimed to be such, whereupon Mr. Rhett retorted that those proclamations only proved that the gentlemen issuing them were "gumps." It was not to be expected that Captain Stockton [1] should know anything about the Constitution. Indeed, there were some who maintained that Congress could not annex territory, yet here they quoted General Kearny and declared that *he* had done so.

Mr. Schenck, of Ohio, quoted from the President's message to show that he regarded Santa Fé as within the bounds of Texas. Yet his general had gone there and set up a government, an *imperium in imperio*. Could Governor Stockton's proclamation as given in the papers be authentic? It might have been treated as a hoax at first, but it was a serious thing. Yet gentlemen contended that Congress must vote supplies and send out generals to regulate conquered peoples subject only to moral and international law. Such a doctrine would not stand. Suppose Captain Stockton had declared himself emperor of California, would Congress have nothing to do with it?

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[1] Stockton's proclamation annexing California had also been received. See *infra*, p. 160 *et seq.*

Mr. Holmes, of New York, held that a conqueror could only do what self-defense required. If the people submitted, he was bound to treat them with clemency, not with military rigor. He had only the rights of the dispossessed sovereign, no more; he was bound to administer the laws as he found them. To say that the inhabitants could be punished for treason was untenable.

Mr. Seddon, of Virginia, appears to have made the longest and clearest speech. He maintained that the law of nations was the only code applicable to our relations with Mexico, and that it alone restricted the conquering power. A wide distinction existed between what the Executive might do at home under the Constitution and what he might do abroad in prosecuting a war under the law of nations. This question was external purely. It was the duty of the conqueror to save the conquered from that worst state of all—anarchy; if he mitigated the rigors of military government by a civil one, that was an act of kindness of which the conquered could not complain. In all this work the President had exercised no powers derivable from the Constitution as merely executive powers; they were the powers of a generalissimo. Nor had he exceeded his authority. What had been done and what might be done by him and his subordinates was subject to review by Congress. After obtaining fuller information, it might be well for them to legislate in regard to the provisional government to be retained over the conquered provinces and to define more specifically the functions of the authorities to be employed in them.[1]

The resolution was adopted. In reply the President sent in (December 22) reports from the Departments of the Army and Navy, accompanied by the documents already quoted in making up the account of the proceedings in New Mexico and California. He explained that the orders and instructions were given to regulate the exercise of the rights of a belligerent in conquered territory—rights necessarily resulting from a state of war and clearly recognized by the laws of nations. Continuing, he said:

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[1] *Globe, ibid.*, 13 *et seq.*

> Among the documents accompanying the report of the Secretary of War, will be found a "form of government" "established and organized" by the military commander who conquered and occupied with his forces the territory of New Mexico. This document was received at the War Department in the latter part of last month, and as will be perceived by the report of the Secretary of War, was not, for the reasons stated by that officer,[1] brought to my notice until after my annual message of the 8th instant was communicated to Congress.
>
> It is declared on its face to be a "temporary government" of the said territory; but there are portions of it which purport to "establish and organize" a permanent territorial government of the United States over the territory, and to impart to the inhabitants political rights which, under the constitution of the United States, can be enjoyed permanently only by citizens of the United States. These have not been "approved and recognized" by me. Such organized regulations as have been established in any of the conquered territories for the security of our conquest, for the preservation of order, for the protection of the rights of the inhabitants, and for depriving the enemy of the advantages of these territories while the military possession of them by the forces of the United States continues, will be recognized and approved.

The President added that if any excess of power had been exercised, the departure had been due to a patriotic desire on the part of the officers to give to the inhabitants the privileges and immunities so cherished by the people of our own country. The excess had resulted in no practical injury, but could and would be early corrected in a manner to alienate as little as possible the good feelings of the inhabitants of the conquered territory.

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[1] Owing to the press of indispensable current business he had not had time to read it.

A few speeches made subsequent to the reception of this message trenched upon the subject, but really brought out nothing new. Halleck, who took part in the affairs hereafter to be narrated, has since given a clear statement of the international law applicable to the case as generally accepted at the time:

> Political laws, as a general rule, are suspended during the military occupation of a conquered territory. The political connection between the people of such territory and the state to which they belong is not entirely severed, but is interrupted or suspended so long as the occupation continues. Their lands and immovable property are, therefore, not subject to the taxes, rents, *etc.*, usually paid to the former sovereign. These belong of right to the conqueror, and he may demand and receive their payment to himself as a part of the spoils of war. . . .
>
> The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. Important changes of this kind are seldom made, as the conqueror has no interest in interfering with the municipal laws of the country which he holds by the temporary rights of military occupation. He nevertheless has all the powers of a *de facto* government, and can, at his pleasure, either change the existing laws, or make new ones.[1]

The theory that conquest added the land subdued to the realm of the victor had come down through the ages, but was obsolete even at that time. But the merest tyro in American constitutional law ought to have known that he could not annex territory, naturalize the inhabitants, and confer political rights by proclamation. The words of Chief Justice Taney, delivered two years later on a case growing out of the Mexican War, will apply:

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[1] Halleck, *Int. Law*, 780 *et seq.*; *ibid.* (Baker, 1893), ii, 437 *et seq.*

> The relation in which [the conquered territory] stood to the United States while it was occupied by their arms did not depend on the laws of nations, but upon our own constitution and acts of Congress. . . . The inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist.[1]

Further comment is hardly necessary to show in what respect the instructions issued from the War Department in relation to temporary governments had been exceeded. Not even a careless reading of a carelessly worded sentence —that authorizing the administration of the oath of allegiance to such officers as would continue to serve—justified a commander in imagining that he could confer the rights of citizenship. Allegiance is a term most commonly applied to citizens or subjects, consequently Secretary Marcy should not have used it here, as that was practically to demand that the officers should exercise their functions in the name of the United States. At least the oath should have been one of only "temporary allegiance." Even this could have been avoided by simply requiring an oath to obey the orders imposed by the military commander.[2] The law on this subject, as it stands in the Hague Convention, is that "any pressure on the population of occupied territory to take the oath of allegiance to the hostile Power is prohibited." [1]

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[1] Fleming *vs.* Page, 9 How., 615 *et seq.*

[2] Compare W. E. Hall, *Int. Law,* sec. 157; Calvo, *Droit Internat.,* sec. 1891.

While Halleck qualifies, in a slight degree, the right of the conqueror to change the municipal law, later writers go much farther and say that changes should be made only in such laws as afford strength to the enemy and are a source of danger to the army of occupation. It is hard to see how the writ of *habeas corpus* or the right of trial by jury could have been introduced into New Mexico under this rule.

In no other case did the commanders go so far in reconstructing the governments on Mexican soil. In some cases political laws were changed or suspended, especially such as related to the revenue. For the most part, however, the municipal laws were not only allowed to stand, but specific directions were given that the administration of justice through the ordinary courts should not be interfered with except where some one connected with the army was a party, or in political cases.[2]

No reason appears to have been given by General Kearny for the course pursued by him in New Mexico, but it probably is fair to assume that he was endeavoring to "abolish arbitrary restrictions." The fact that the commander in New Mexico, and in California, as we shall see later, pursued a course different from that adopted elsewhere is probably due to the fact that they knew it to be the purpose of the administration to make a permanent conquest of those countries.

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[1] Holls, *The Peace Conference at The Hague*, 447.

[2] Scott's General Orders, nos. 20 and 287, February 19 and September 17, 1847. To be found in Birkhimer, *Mil. Govt.*, 466 *et seq.*

III. THE CONQUERED COUNTRY. ITS NEW GOVERNMENT

The territory brought under subjection by proclamation and put in care of a quasi-civil government by General Kearny was one of vast extent, including besides the present territory of New Mexico, all of Arizona and a part of Colorado. The population, however, was not large, and centered about Santa Fé. For our purposes the remote districts may be disregarded. According to the most reliable data, the total pure white and mixed population amounted to about 61,500. The number of wild Indians was estimated at 36,950, of whom 12,000 were Comanches, 7,000 Navajoes; the Pueblo (civilized) Indians above five years of age numbered 6,524. The population of Santa Fé, the chief town, was estimated at 3,000 just before the American occupation, with 3,000 more in the vicinity under its jurisdiction; just after the occupation at 12,000, of whom 3,500 were soldiers.[1] A large part of the increase was due to visitors, mountaineers, and traders who had flocked in to supply the army.

The character of the people was about the same as that of Mexicans elsewhere. They were naturally indolent, and fond of smoking, dancing, and gambling. The lower classes were as ignorant as they were idle; many had been reduced to peonage through the law of debt. The education of the upper classes was sadly neglected. In 1847, there was only one public school in Santa Fé, with one teacher, supported by county funds. The number of private schools is not known, but there were several in the territory, some supported entirely by private contributions, while others received government aid. In 1840, six schools received a total of $1,850 from the government. Only one printing-press was to be found in the territory.[1]

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[1] N. Mex. Blue Book; Mayer, *N. Mex. and Cal.*, ii, 359 *et seq.*; Ladd, *Story of N. Mex.*, 263.

The previous political history of the territory is not very attractive. Like the rest of Mexico, it had had its share of revolutions and usurpations by political dictators. There was a considerable overland trade in 1843—$450,000, carried on with 230 wagons, yielding from $50,000 to $80,000 in annual revenue. But the central Mexican government received very little benefit from this, as nearly half of it was embezzled by the customs officers. Because of troubles arising from this trade, Santa Anna issued a decree, in 1843, closing the northern ports to foreign commerce. For a few years Governor Armijo established a tariff rate of his own—$500 per wagon, regardless of size or value. The traders soon learned to take advantage of this by carrying costly goods in large wagons, whereupon the governor went back to *ad valorem* rates, but without regard to the Mexican imposts, which averaged about one hundred per cent. upon the cost in the United States.

The judiciary was a Spanish inheritance, consequently much like that we have already met with in Louisiana and Florida. Further notice of it at this point is unnecessary.

In 1853, Mr. Phelps, a member of Congress, speaking of the officials of the government set up by General Kearny in place of the one he had overthrown, said that they were Americans residing in New Mexico. While this was true in part, it is likely to create a wrong impression. They were not mere adventurers. Some of them had resided there many years, ten or fifteen, and had become bound to the country by marital and other ties. This was true of the governor, Charles Bent, a native of Virginia, who had been in New Mexico since 1832. The secretary, Donanciana Vigil, was a native of New Mexico, had held a number of public offices, both military and civil, and enjoyed the confidence and respect of the whole people. Francis P. Blair, Jr., district attorney, was a member of the Missouri Blair family, and was afterwards prominent in public life at Washington. Two members of the supreme court, Joab Houghton and Charles Beaubien, were Americans, but the latter had been a resident of Taos, New Mexico, since 1827, had married a native, and was widely known and respected. The other member, Antonio José Otero, was a member of an old Mexican family, a man of high character and reputation, and of influential connections. The Oteros are prominent in public life to this day. Nearly all the other officers, judging in some instances only by their names, were natives, some of them members of prominent families.[1]

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[1] Sen. Doc., 30 C. 1 S., no. 26; Report of Gov. N. Mex. to Sec. Int., 1900, p. 49.

Twice in his reports General Kearny spoke of the feeling with which the change had been received. August 24, two days after his famous proclamation, he says: "The people are now tranquil, and can easily be kept so. The intelligent portion know the advantages they are to derive from the change of government, and express their satisfaction at it." Again, in reporting (September 16) a journey of one hundred miles down the Del Norte to Tome: "The inhabitants of the country were found to be highly satisfied and contented with the change of government, and apparently vied with each other to see who could show us the greatest hospitality and kindness. There can no longer be apprehended any organized resistance in this Territory to our troops; and the commander of them, whoever he may be, will have nothing to attend to but to secure the inhabitants from further depredations from the Navajoe and Eutaw Indians; and for this object paragraph three of Orders No. 23 was this day issued."[1]

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[1] N. Mex. Blue Book; Prince, *Hist. N. Mex.*, 307 *et seq.*

Soon after this the general set out for fresh fields of conquest. How far his sanguine hope for the peace and prosperity of the country he was leaving were justified the sequel will show.

IV. The Revolt and Reconquest

About three hundred troops were to follow General Kearny to California. Colonel Doniphan was directed to remain in New Mexico with his regiment until relieved by Colonel Price, then daily expected with a regiment from the United States.[2] September 25 the movement for California was begun.

Hardly had the general passed beyond the scenes of his conquest when signs of unrest began to manifest themselves among the people he had left so happy and contented. While the people generally, says the historian Prince,[3] had apparently submitted to the new order with good grace, yet there was naturally much discontent beneath the quiet exterior, especially among those who had been leaders and who thought that the attainment of their ambition or the pursuit of their pleasure might be interfered with by the new régime. Chafing at the thought that others had superseded them, some of the former leaders formed a wide-spread plot to kill or drive out of the territory all Americans and all Mexicans who had taken office under them. The date of the uprising was first set for December 12, but was postponed a week for the better perfecting of plans, and then again till December 24, when it was thought the soldiers would be engaged in festivities at the various saloons and could, while thus dispersed and unarmed, be easily killed or captured. This delay proved fatal, for a Mexican friendly to the new order of things informed Governor Bent of the plot a week before the day for the uprising. Colonel Price also had heard of the movement, and both the civil and military authorities now took active measures to seize the conspirators. Some of the supposed leaders were arrested and left with the military authorities to be summarily dealt with, but two of them escaped in the direction of Chihuahua.[1]

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[1] H. Ex. Doc., 29 C., 1 S., no. 19, pp. 19, 24.

[2] Sen. Ex. Doc., 30 C. 1 S., no. 7, p. 45.

[3] *Hist. N. Mex.*, 313 *et seq.*

In reporting this occurrence to Washington, Governor Bent said that the conspiracy was confined to the four northern counties, and that the leaders were men of little standing.[1] The latter statement is contradicted by Prince, who gives the names and standing of several. Among them he mentions Diego Archuleta, who had sat in the Mexican Congress for New Mexico; Tomas Ortiz, who had been second in command to Armijo—both men of considerable influence—and two priests, José Manuel Gallegos and Juan Felipe Ortiz. The priests in particular were active. Archuleta and Tomas Ortiz, who were to have been commanding general and governor respectively, escaped. No convictions appear to have been made.

In his report Governor Bent took occasion to say that he considered this attempted revolt as conclusive evidence of the necessity of keeping an efficient military force—about one thousand men—in the territory for several years.

It was now thought that the insurrection was suppressed, but such was not the case. January 14, 1847, Governor

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 1, p. 520; H. Ex. Doc., 30 C. 1 S., no. 70, p. 17.

Bent, supposing all danger past, left Santa Fé for his home in Taos. There, says Secretary Vigil in a report sent to the Secretary of State, Mr. Buchanan, he was assailed on the morning of January 19, in his private dwelling, by a company of Indians of the Taos Pueblo, together with a number of Mexican inhabitants of the town, and slain with all the horrible details of savage barbarity. On that and the following day twelve other Americans and two Mexicans suffered a similar fate. Among them were the governor's brother-in-law and a son of Judge Beaubien, the circuit attorney, the sheriff, and prefect (Cornelio Vigil) of the county.

Whether this was the preconcerted opening of a general uprising is not known, but the insurrection soon became general. The lower classes of Mexicans in the valley of Taos and of the small towns in the vicinity rose *en masse* and joined the pueblos in pillage and murder. At Arroyo Hondo, twelve miles above Taos, seven Mexicans were killed; at Mora, Mr. L. Waldo, who had translated the Mexican laws for General Kearny, known and respected for some years as a merchant in the territory, suffered death, together with several other Americans. A revolutionary army was now organized and circulars were sent to different parts of the territory to excite the people to arms.

When Colonel Price heard of Governor Bent's murder he at once took active measures. The resident Americans and some natives came to his aid. Ceran St. Vrain, a native of Missouri, raised a volunteer company of fifty-seven men in Santa Fé, composed of all the American residents and a few natives, which brought the colonel's immediate command up to three hundred and ten. His entire force in and about Santa Fé amounted to only four hundred and twenty-seven men, rank and file. But with these forces Taos was soon captured, after two battles in which one hundred and eighty-six of the insurrectionists were slain; seven Americans were killed and forty wounded.[1]

When the alcalde of Las Vegas received the news of the uprising and the call to arms he consulted with some of the leading men, who advised him to keep faith with the United States. He then assembled the people, reminded them of his oath, which they had witnessed, and said that he considered them bound through himself. "As for me, I assure you that I am determined to live and die by that oath." This, with the action of Captain Hendley, who occupied the town next day with two hundred and fifty men, prevented an uprising there. January 24 the captain attacked Mora, now occupied by one hundred and fifty armed Mexicans, but fell in the assault and his command withdrew. February 1, Captain Morin captured the town and demolished a considerable part of it. By February 16 the central and southern districts had been pacified, and the insurrectionists were confined to the north, where hardly a man of wealth or consequence, says Secretary Vigil, was concerned.[1]

The cost of the insurrection was estimated by Vigil at something over $100,000 in loss of property to Americans and natives. The loss of life amounted to more than two hundred, mainly on the side of the insurgents.

Two leaders of the revolt were slain in battle. One, Pablo Montoya, was court-martialed and hanged. Another, Tamos, a Pueblo Indian, was shot by a private while in the guard-room at Taos. February 7, fourteen others were tried for complicity in the murder of Governor Bent, found guilty and executed. At the March term of the United States district court for New Mexico four were indicted for treason. One, Antonio Trujillo, was found guilty and sentenced to death, one was discharged under a *nolle prosequi,* and the other two obtained continuance to the adjourned term in the following May. By April 1, twenty-five of those confined at Santa Fé had been discharged, the jury not finding sufficient evidence to indict for treason. Fifty were still confined at Taos awaiting trial.

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[1] Prince, *ibid.;* H. Ex. Doc., 30 C. 1 S., no. 70, pp. 18 *et seq.; ibid.*, no. 8.

Immediately after Trujillo was sentenced, a petition, signed by the court, by the "United States district attorney," the counsel for defense, most of the jury, and many respectable citizens, was laid before Secretary Vigil, now governor, by the Organic Law of the territory, praying for a stay of the execution until a petition could be laid before the President for the pardon of the prisoner on account of his age and infirmity. The governor granted the request, though satisfied that the accused had had a fair trial, and had been legally convicted and justly sentenced, and reported (March 23) the matter to Secretary Buchanan.

Mr. Blair, the "United States district attorney," also made a report (April 1) to the Attorney-General. He, doubtless, was aware how General Kearny had declared the inhabitants of New Mexico to be citizens of the United States, and liable to penalty for infraction of their laws in the same way as citizens of any other territory; how he had established a superior court, with jurisdiction as a United States district court. As "district attorney," Mr. Blair had, he said, felt it to be his duty to prosecute all acts of treason committed by the inhabitants of the territory. He added:

> In nearly all the cases tried, the counsel for the defence have entered pleas to the jurisdiction of the court, which the court

over-ruled, and in the case of Trujillo, who was convicted, the defence plead the jurisdiction of the court before the jury, declaring it to be unconstitutional to try any *native* inhabitant of New Mexico for the crime of treason against the government of the United States, until by actual treaty with Mexico he became a citizen. The court ruled out any consideration of this point by the jury, leaving it only the evidence and facts upon which to make its verdict. Considering that it was constituted, the court was bound by its oath to view all the inhabitants of New Mexico as citizens of the United States, and to execute the laws in regard to them as such, leaving the responsibility of the question of its constitutionality to fall back upon the power which constituted it.

I am anxious to receive your counsel and advice at the earliest possible moment in regard to all the matters above referred to.[1]

January 11, 1847, Secretary Marcy addressed a letter to General Kearny, commanding the United States army in California, Mexico, and sent him at the same time a copy of the President's message, with the documents accompanying it, in answer to the resolution of the House discussed in a preceding chapter. In this letter he informed the general that, in conferring political rights upon the people of the territory, he had gone beyond the lines designated by the President, as such rights could be conferred only by Congress. "So far as the code of laws established in New Mexico, by your authority, attempts to confer such rights, it is not approved by the President, and he directs me to instruct you not to carry such parts into effect."[2]

When Governor Vigil's letter was received, Secretary

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[1] H. Ex. Doc., 30 C. 1 S., no. 70, pp. 24 *et seq.*

[2] H. Ex. Doc., 31 C. 1 S., no. 17, p. 244.

Buchanan turned it over to the War Department. June 11, 1847, Secretary Marcy wrote to Colonel Price, commanding at Santa Fé, to the effect that the government there was purely military, not deriving its authority from the laws of Congress or the Constitution of the United States; that the President could not exercise any authority over it other than as commander-in-chief, and that he would not interfere beyond the instructions of June 3, 1846. The appointment of a governor (which Vigil had urged) was left to the commanding officer. The petition for the pardon of Trujillo had not been received, but that matter also was left to the colonel, with an expression of the hope that the prisoner would be spared.[1]

Upon the receipt of Mr. Blair's letter the Attorney-General turned it over to Secretary Marcy, who again (June 26) wrote to Colonel Price:

> I perceive that down to the 1st of April last . . . some mistaken views still prevailed in New Mexico concerning the civil government there established; and I am, therefore, apprehensive that you are not in possession of my letter of the 11th of January last, relative to that subject, . . . a copy of which was sent to the commanding officer at Santa Fé
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> The territory conquered by our arms does not become, by the mere act of conquest, a permanent part of the United States; and the inhabitants of such territory are not, to the full extent of the term, citizens of the United States. It is beyond dispute that, on the establishment of a temporary civil government in a conquered country, the inhabitants owe obedience to it, and are bound by the laws which may be adopted. . . . Those in New Mexico, who, in the late insurrection, were guilty of murder, or instigated others to that crime, were liable to be punished for these acts, either by the civil or military author-

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[1] H. Ex. Doc., 30 C. 1 S., no. 70, p. 32.

> ity; but it is not the proper use of legal terms to say that their offence was treason committed against the United States; for to the government of the United States, as the government under our constitution, it would not be correct to say that they owed allegiance.[1]

Again it was the decided wish of the President that Trujillo should be spared.

Ladd tells us that Trujillo was hanged as a traitor,[2] but, in view of what has been quoted above, the writer is inclined to doubt this unsupported statement.

It can hardly be necessary to say anything further on the question of allegiance and the right to prosecute for treason. We can only regret that President Polk's promise to correct General Kearny's mistakes was not sooner fulfilled. But a word may be added upon the subject of insurrection and the right to punish for this.

According to the writers on international law, the inhabitants of a country which has submitted or formally surrendered are virtually in the condition of prisoners of war on parole. To the conqueror they owe submission and obedience so long as he does not treat them with unmerited harshness—confiscate or destroy their property, take away the liberty of some, the lives of others. Says Halleck:

> The right of insurrection in war, therefore, rests upon the same principle as the right of revolution against an established government. . . . The insurgents taken in arms, as well as their instigators, may therefore be put to death, and their property confiscated or destroyed. . . . . Such severe rights should always be used with moderation, and their exercise tempered with mercy. Hence, in modern wars, only the leaders and instigators of a military insurrection are usually pun-

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[1] H. Ex. Doc., 30 C. 1 S., no. 70, p. 33.

[2] *Story of N. Mex.*, 293.

ished with death, while the common people who are engaged in it are more leniently dealt with. Sometimes, heavy contributions are levied by way of punishment upon the place or district of country where the insurrection occurs.[1]

The Supreme Court of the United States had already recognized the principle of temporary allegiance in the case of Castine, Maine, occupied by the British in 1814. "By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only as it chose to recognize and impose." [2]

The question now is whether there had been provocation sufficient to justify the insurrection. Unfortunately the Mexican sources upon the subject are scant, and their glaring inaccuracies cast doubt upon their statement of matters concerning which little is known. One writer speaks of "horrible crimes" and the exaction of a contribution of 80,000 pesos. The same writer says that the outbreak originated in the killing by a New Mexican of his wife, whom a Yankee had seduced. A mob formed to support the native, whom the soldiers were trying to secure. The *Sonorense* (March 5, 1847) speaks of frequent "conflicts caused by the outrages of the soldiers, who, except 300 veterans (the dragoons), were chiefly Irish and Italians"![3]

Shortly after the revolt accounts of the lawlessness on the part of the soldiers began to appear in the American press. "The soldiery have degenerated into a military mob, are the most open violators of law and order, and daily heap insult and injury upon the people. . . . One-half the captains do not know the number of their men nor where they are to be found; and they themselves are to be seen nightly in fandangos and even less reputable places of dissipation. . . . About one-fifth of the whole command have died from the effects of dissipation. . . . The want of ability and military knowledge in the commander, added to his inability to control his officers and soldiers, can only produce the strongest feelings of disgust and hatred, and desire to rebel among the native inhabitants. . . . It is certain that if such a state of things were to be found in any of the territories of the U. S., neither civil nor military govt would exist for a week." [1]

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[1] Halleck, *Int. Law*, ii, 450 *et seq.*

[2] U. S. *vs.* Rice, 4 Wheaton, 254.

[3] Quoted in H. H. Bancroft, *Ariz. and N. Mex.* (*Works*, xvii), 434.

The letter just quoted was written after the revolt, but if such a condition of affairs existed then, it is reasonably fair to assume that something of the kind was experienced before. The complaints of lax discipline became so loud and persistent that Secretary Marcy referred to them in his letter of June 26, stating that while he did not give credence to all newspaper reports, they could not pass entirely unnoticed. A rigid enforcement of discipline was recommended.[2] Later in the year the reports were confirmed, at least by innuendo, in an official report made by Mr. Thomas Fitzpatrick, Indian agent for Upper Platte and Arkansas, who had visited Santa Fé.[3]

Governor Vigil, however, gives quite a different view of the causes of the revolt. He finds that one of the leaders, Pablo Montoya, was the head of a similar insurrection in 1837, when he brought his followers to Santa Fé and then basely deserted them for pay. In 1843, the Taos Indians rose and sacked the tithe granaries, but the government took no notice of the affair. Other pillagings of the same year also went unpunished. The apathetic and criminal conduct of the previous government in not dealing out justice to these offenders Vigil declared to have been the chief cause of this last insurrection.[1]

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[1] Quoted in H. H. Bancroft, *Ariz. and N. Mex.* (*Works*, xvii), 439, quoting letter in Niles, lxxii, 252.

[2] *Supra*, 123.

[3] H. Ex. Doc., 30 C. 1 S., no. 8, Append., 240 *et seq.*

The manner in which the attack was begun does not indicate any special resentment against the soldiers. It rather shows a predetermined plan to wipe out those, both native and American, who had accepted office under the new régime. Resentment on the part of those who had been displaced was only natural. Besides, "carpet-baggers" and "scalawags," to borrow terms from later political history, are not always held in high esteem, even when they have done nothing particularly criminal.

Just what "horrible crimes" were referred to by the Mexican writer quoted above is not clear, but he probably had the excesses of the soldiers in mind. His statement about the contribution of 80,000 pesos is unsustained. Indeed, there is much evidence that no such contribution was levied. One historian tells us that no requisitions could be made upon the inhabitants to supply the wants of the troops, as they had been declared citizens, and that this worked some hardships, as supplies could only be had for cash, with which the army had not been bountifully supplied.[1] No official report was ever made of the requisition referred to.

This was the last revolt. Later in the year the American forces were strengthened. This may have been a very strong reason for keeping quiet, but the natives appear to have soon realized that they really had more of freedom under the American flag, and so became reconciled to the change.[2]

[1] H. Ex. Doc., 30 C. 1 S., no. 70, pp. 21, 23.

[2] Prince, 299, 313.

CHAPTER II

THE MILITARY ADMINISTRATION OF NEW MEXICO

I. The Struggle for a Free Government

According to the Organic Law, as we have already seen, Secretary Vigil became governor upon the death of Governor Bent, but he sought the appointment of another from Washington. This, however, was left to the commanding officer. December 17, 1847, Vigil was appointed governor by Colonel Price, and served in that capacity until October 11, 1848, when Colonel J. M. Washington, then in command at Santa Fé, assumed the duties of "civil and military governor." October 23, 1849, he was relieved by Colonel John Munroe, who served in that capacity until the end of the military régime.[1]

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[1] N. Mex. Blue Book.

John Marshall Washington (born in Virginia, 1797; died at sea, 1853) was graduated at West Point in 1814 and appears to have served in the army continuously. At the outbreak of the Mexican War he held the rank of captain, but was subsequently brevetted lieutenant-colonel for meritorious conduct at Buena Vista. From June 24 to December 14, 1847, he acted as governor of Saltillo, Mexico.

John Munroe (born in Scotland, 1796; died in New Jersey, 1861) was a classmate of Colonel Washington at West Point; was brevetted lieutenant-colonel for gallantry at Monterey, and colonel for the same reason at Buena Vista.

Sterling Price (born in Virginia, 1809; died in St. Louis, 1867) was a member of Congress from Missouri at the outbreak of the war, but resigned and raised the second regiment of Missouri cavalry. He was afterwards governor of Missouri and a general in the Confederate army.

Governor Vigil's administration does not seem to have been very eventful—nor lucrative to the office-holders. The governor called Secretary Marcy's attention to the fact that the officials were to be paid from the United States treasury, but that no officer appeared to have been empowered to make such disbursements. A year's term had expired September 22. The officers had performed their duties faithfully, duties sometimes onerous and perplexing, and now deserved their pay. In some cases they were dependent upon it for a living.[1] The Secretary does not appear to have made any reply.

In December, 1847, the territorial legislature, which had been elected according to the Kearny Code, met at Santa Fé and continued in session twenty days. The governor's message gave prominence to the need of public education, but of course the legislature could not then accomplish much for that cause. The laws passed were printed in pamphlet form, to which was added Order No. 10, imposing a duty of six per cent. on imports. February 5, 1848, Colonel Price, by special Order No. 5, approved the acts and ordered them to be observed. However, another order (No. 10) abolished the offices named in the statutes as secretary of the territory, United States district attorney, and United States marshal.[2] One act passed was to authorize the election of delegates to a convention to consider the question of annexation to the United States.[3]

Whatever may have been the efficiency of this civil-military government for good or its power for oppression, the people submitted to it as one of the fortunes of war. But after the ratification of the treaty of peace with Mexico,

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[1] H. Ex. Doc., 30 C. 1 S., no. 70, p. 35.

[2] N. Mex. Blue Book; Report of Gov. N. Mex., 1900, p. 14.

[3] Niles, lxxiii, 305.

May 30, 1848, they began to think of the free territorial government which had been promised them. A distinguished United States senator, Mr. Benton, of Missouri, took it upon himself to give some advice to the people of California and New Mexico on this subject. In a letter of August 28, 1848, he advised them to meet in convention, provide for a cheap and simple government, and take care of themselves until Congress could provide for them.[1] The War Department does not appear to have issued any orders up to this time defining the status of affairs in New Mexico. In a letter to Colonel, then Brigadier-General, Price, dated May 22, 1848, Secretary Marcy had made some general suggestions, among them that he should see "that wholesome regulations in relation to the civil government should be established," in case the province was ceded to the United States.[2]

Seemingly one of the first grievances to be dealt with was connected with the matter of taxation. After the treaty of peace, General Price ordered that the six per cent. imposts be still collected on goods from the United States. This did not seem to the inhabitants to be quite in accord with the privileges of citizens of the United States, and they held meetings to protest against it as unconstitutional, New Mexico being considered a part of the United States. General Price replied that the tax had been imposed to support the civil government, that it had been approved by the President, with whom the matter now rested, and that, in view of these facts, he was not disposed to modify or abolish it, however much his feelings might incline him to do so.[3] November 8, Colonel Washington, now in command, wrote to Secretary Marcy in favor of continuing the tax, saying that the government would be without funds if it was not collected.[1] But the Secretary had already received and acted upon the protest. On October 12 he ordered the collection of imposts on goods from the United States to be stopped and all funds so collected since May 30 to be refunded.[2] April 3, 1849, Colonel Washington stopped the collection, "in consequence of the views of the President in his last annual message to Congress relating to the collection of customs in New Mexico."[3]

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[1] Niles, lxxiv, 244 *et seq.*

[2] H. Ex. Doc., 31 C. 1 S., no. 17, p. 257.

[3] Niles, lxxiv, 259 *et seq.*

As the military governor did not provide "wholesome regulations" satisfactory to the people, Governor Vigil issued a call for a convention, which met at Santa Fé October 10, 1848. This body "respectfully petitioned Congress for the speedy organization, by law, of a territorial government, one purely civil in character." They represented that the Kearny Code and statute laws, with a few alterations, would be acceptable. They also asked to be protected against the introduction of slavery. Copies were forwarded to Senators Benton and Clayton (of Delaware), to be presented by them to Congress.

When the petition was read in the Senate it produced something of a tempest in a tea-pot. Mr. Calhoun objected to it as "disrespectful" to the people of the slave States, and a heated debate ensued. Some feared that "We, the people of New Mexico," simply meant fourteen free-soilers who were endeavoring to impose upon Congress. No one could give any information as to how truly representative the convention had been, but the petition was finally referred to the Committee on Territories, where it seems to have rested in peace.[1]

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[1] Sen. Ex. Doc., 31 C. 1 S., no. 1, p. 104.

[2] H. Ex. Doc., 31 C. 1 S., no. 17, p. 262.

[3] MS. in War Department.

How far the convention represented the people of New Mexico it is impossible to say, but it certainly was not a gathering of Americans. Several members of the existing government signed the petition; most of the other names betray a Mexican origin.[1]

Just three days before this petition was read in Congress (December 13), Secretary Marcy took tardy steps to make known to the people of New Mexico the views of the administration in regard to their civil affairs. He reaffirmed the position which Mr. Buchanan, as Secretary of State, in a previous letter, had taken:[2] that, at the conclusion of peace, the military government which had been established under the laws of war ceased to derive any authority form that source of power, but was continued as a *de facto* government, with the presumed consent of the governed. After assuring the people that this government could exercise no powers inconsistent with the Constitution of the United States, the Secretary continued:

> Congress will be in session within sixty days, and their attention will be at once directed by the President to the subject of providing an adequate civil government for this Territory . . . In the meantime it will be the duty of the commander of our military force to recognize the present government *de facto,* to respect the officers of it, and to lend the aid of the military power to protect the rights of persons and property of the inhabitants of the Territory. Though he had not the right

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[1] N. Mex. Blue Book, 99 *et seq.; Globe,* 30 C. 2 S., 33 *et seq.*

[2] Letter from Mr. Buchanan, Secretary of State, dated October 7, 1848, to Mr. Voorhies on the eve of his departure for California as agent of the Postoffice Department. See *infra,* p. 214, for a lengthy quotation from this letter.

to change the existing civil government, it will be his duty to regard it as an existing government until it is changed by competent authority. He is directed to quiet any uneasiness which may arise in the minds of the people on account of their anomalous state by assurances that the executive of the United States will do what appertains to him to remedy any inconvenience which they may now experience, to secure their rights, and to extend to them in the amplest manner all the benefits of our political institutions.[1]

A sentence in President Polk's message of December 5, 1848, seems to mean that Secretary Buchanan's letter was sent to California and New Mexico at the same time. It might have relieved some uneasiness had it been sent still earlier, for in his message of July 22 the President had said that "these temporary governments necessarily cease to exist" upon the exchange of the ratifications of the treaty of peace. This statement, made as it was without any qualifications, certainly sounded as though the people were to be left to shift for themselves. Senator Benton's letter of advice was but an amplification of this idea. But in the message of December 5, the qualification was added that the temporary military governments had ceased to derive any authority from the rights of war. The very limited power possessed by the Executive had, however, been exercised to preserve the inhabitants from a state of anarchy. These messages were appealed to later by certain leaders in justification of measures hereafter to be described.

Briefly stated, the policy of the administration was simply this: While, in its opinion, it had no authority to continue the military governments, they would be maintained upon the "presumed consent of the governed."

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 271, 258.

What would be done in case that presumption was discovered to be ill-founded was not indicated.

But with a change of administration, through the inauguration of President Taylor, March 5, 1849, there seems to have come a slight change of policy toward New Mexico. In the spring, James S. Calhoun went to New Mexico as Indian agent; but upon his arrival, says a historian of New Mexico,[1] he declared that he had secret instructions from the government at Washington to induce the people to form a state government. Confirmatory evidence of this statement is found in the fact that the question was discussed in public meetings shortly after his arrival at Santa Fé.[2] At one of these meetings (August 21, 1849) Colonel Washington was requested to call a convention to formulate plans for a government. In the temporary absence of Colonel Washington, Lieutenant-Colonel B. L. Beall ordered an election to be held, September 10, for delegates to such a convention.

This body met at Santa Fé, September 24, 1849, a date following rather close upon the call. The writer can give no information as to how the delegates were elected, but they appear to have been apportioned to the counties according to the Organic Law. The names of nearly all the nineteen members have the Mexican sound. Five were then serving the existing government, and five others were ex-members of it. One of these was Antonio J. Otero, a justice of the supreme court. The secretary of the convention, J. H. Quinn, who was not a member, had served as "attorney-general" for the southern district. A. J. Martinez, the president, a cura [1] and teacher at Taos, had presided over the convention of October 10, 1848.

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[1] Davis, *El. Gringo*, 111 *et seq.*, quoted in Bancroft, *Ariz. and N. Mex.*, 446, 447, n.

[2] Mr. Calhoun appears to have arrived at Santa Fé about the last of July. Ex. Doc., 31 C. 1 S., no. 18, p. 191.

The first thing done by the new convention after organization was to elect Hugh N. Smith a delegate to Congress. A committee of five was then appointed to report the basis of a constitution for the territory and to draw up instructions for the consideration of their delegate. On the second day Colonel Washington, "military and civil governor," Secretary Vigil, and the members of the supreme court were invited to seats in the convention. The first two accepted. As the petition of grievances adopted by this body was substantially adopted in a more elaborate paper by a later and more important convention, it will be omitted here. Some special features were set forth which they wished to have incorporated in the territorial act. Their delegate was instructed to oppose the formation of a territorial government, which was preferred to a state, unless the making of laws was confined to a bicameral legislature.[2]

February 4, 1850, Mr. Smith's credentials were presented to the House of Representatives and referred to the Committee on Elections. Two months later the committee reported against seating Mr. Smith, because "New Mexico [though a department of the republic of Mexico and entitled to representation in the national Congress] was not acquired as a political division, but as a part of a large tract of country. . . . Upon that transfer all political laws, all governmental organizations, ceased to have any legal existence." [3] Attention was also called to the fact that Texas claimed a large part of the territory. The report came up for discussion several times, but a resolution to admit Mr. Smith was finally (July 19) laid on the table. September 9, Mr. Smith and Mr. Albion W. Babbitt, of Utah, were allowed a *per diem* of five dollars up to the time of their rejection and two thousand dollars for mileage. No action was taken in response to the appeal of the convention.

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[1] The spelling regularly used in the official correspondence.

[2] Ex. Doc., 31 C. 1 S., no. 17, pp. 93 *et seq.*

[3] H. Rep. of Com., 31 C. 1 S., no. 220.

The change of policy in regard to civil affairs was further indicated in a letter, dated November 19, 1849, from Mr. George W. Crawford, Secretary of War, to Lieutenant-Colonel George A. McCall, then about to join his regiment in New Mexico. The Secretary adverted to the difficulty under which the people labored. "To remove it may, in some degree, be the part of the duty of the officers of the army, on whom, under the necessities of the case, has been devolved a partial participation in their civil affairs. It is, therefore, proper that I should say that it is not believed that the people of New Mexico are required to await the movements of the Federal government in relation to a plan of government proper for the regulation of their own internal concerns. The Constitution of the United States and the late treaty with Mexico guarantee their admission into the Union of our States, subject only to the judgment of Congress. Should the people of New Mexico wish to take any steps toward this object, so important and necessary to themselves, it will be your duty, and the duty of others with whom you are associated, not to thwart, but advance their wishes."[1]

It is alleged that Colonel McCall, upon his arrival at Santa Fé in the spring of 1850, informed the people that no territorial government would be granted by Congress, and that President Taylor was determined that New Mexico should be erected into a state government, in order to settle the question of slavery, and also that of the boundary with Texas. The delegate in Congress, Mr. Smith, wrote home to the same effect.

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[1] Ex. Doc., 31 C. 1 S., no. 17, p. 281.

April 20, 1850, a public meeting held in the court-house at Santa Fé adopted resolutions in favor of a state government, and requested Colonel Munroe, the commanding officer, to call a convention. Meetings were also held in other counties for this purpose. Three days later he complied by ordering the qualified electors to assemble May 6, and elect delegates to a convention to be held at Santa Fé May 15, for the purpose set forth at the public meeting. President Fillmore supposed that he adopted this course in consequence of the instructions contained in Secretary Crawford's letter quoted above.[1]

For some time a dispute had been in progress with Texas in regard to the boundary. As the region about El Paso had been included in the ninth military district, Colonel Munroe sent Major Van Horne, with a battalion, to take charge of that post. When the major arrived he was called upon by representatives of Texas and of New Mexico for assistance in enforcing the laws of their respective governments, especially in regard to taxation. In this dilemma he asked the advice of Colonel Munroe, who directed him (December 28, 1849) to sustain the civil jurisdiction of New Mexico over such places east of the Rio Grande and south of the ancient limits of New Mexico as Texas had not taken under civil jurisdiction. This, he explained, was done in order that the people might have protection until Texas officially assumed jurisdiction or the boundary dispute was settled.[2]

This order, simple enough on its face, appears to have been misunderstood by the Secretary of War, Mr. Crawford, who disapproved (March 8, 1850) of it as "manifestly assuming to decide" the boundary dispute, and "professing to extend a 'code' of laws which had not been accepted by the people even while under military authority." The colonel was further informed that the only regulations applicable to the conditions were the laws in force at the time of the conquest of New Mexico, or such as Texas might establish, so far as they were not repugnant to the Constitution of the United States. In support of this a quotation was made from the Supreme Court's deliverance in the case of the American Insurance Company *vs.* Canter, to the effect that local laws remain until altered by the proper authority. As for New Mexico, it was presumed that a government *de facto* remained, or had been established, resting upon the consent of the inhabitants. Such a government he must aid and respect.[1]

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[1] Sen. Doc., 31 C. 1 S., no. 60, p. 2.

[2] *Ibid.*, no. 67, p. 8.

Now it so happened that a Major Robert S. Neighbors, a commissioner of the state of Texas, was in Santa Fé in April for the purpose of extending the jurisdiction of his state to that place. An article in the *New Mexican* extra of April 10, 1850, calling upon the people to form a state government and declare explicitly for or against slavery (which was the disturbing factor in Congress in the way of territorial legislation), attracted his attention, as also some posters three days later calling the public meeting mentioned above. These he inclosed to Colonel Munroe, April 15, and entered a solemn protest against the contemplated action, claiming the territory for Texas until Texas had extended her jurisdiction, or until her will was known.[1] He also reported the matter to Governor Bell, of Texas, who addressed (June 14) the President about the opposition to the authority of his state, and asked if Munroe's proclamation calling the convention was approved. The Secretary of State, Mr. Webster, endeavored (August 5) to smooth away the difficulties by explaining that the order, though approved as having been issued apparently in consequence of the order of the late Secretary of War, dated November 19, did not invade the rights of Texas by assuming any boundary, as the territory of New Mexico was undefined.[1]

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[1] Sen. Doc., 31 C. 1 S., no. 56, pp. 3 *et seq.*

The convention, however, did not wait for any adjustment of difficulties, but met on the day appointed, May 15. Of the nineteen members, eight were then serving the existing government and four others had been in its service, while two had sat in the legislative assembly of 1847. The secretary of the former convention, J. H. Quinn, was elected president of this one. Two judges of the supreme court, the attorney-general, and Secretary Vigil were members. The last named acted as one of the secretaries.

The writer has found nothing indicating any interference by the military with the election or with the free action of the convention. Colonel Munroe did assume authority to make a slight change in the election law, but it was one of no consequence. He merely ordered the returns to be made within four days after the election to the secretary of the territory, instead of within eight days, as provided in the Kearny Code. He also exercised his discretionary power to direct the prefects to appoint judges of election. It is probably of no significance that three prefects were elected to the convention.

The work of the convention was finished so quickly—in ten days—that the instrument adopted must have been copied from the constitutions of some of the states without much change or debate. Only a few provisions need be noticed. The legislature alone, by special act, could grant divorce. This body was also empowered to levy an income tax. No soldier of the United States army could be allowed to vote in the state. The clause forbidding the introduction of slavery was adopted unanimously and made the subject of a special address to the people. The eastern boundary was fixed at the one hundredth parallel, without regard to the claims of Texas.[1]

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[1] Sen. Doc., 31 C. 1 S., no. 56, pp. 7 *et seq.*

In response to the request of the convention, Colonel Munroe submitted (May 28) the constitution to the people to be voted upon on June 20; he also ordered an election of officers to carry it into effect in case of its adoption. However, in doing this he made the reservation that "all action of the governor, lieutenant-governor, and of the legislature shall remain inoperative until New Mexico be admitted as a state under said constitution, except such acts as may be necessary for the primary steps of organization, and the presentation of said constitution properly before the Congress of the United States. The present government shall remain in full force until, by the action of Congress, another shall be substituted."[2]

According to the election returns, the constitution was adopted by a vote of 8,371 to 39. Dr. Henry Connelly was elected governor by 4,604 votes to 3,465 received by his opponent, a man by the name of Baca. Manuel Alverez received 4,588 votes for lieutenant-governor against 3,465 for Ceran St. Vrain.[3]

The legislature to be elected was ordered to convene July 1. Three days thereafter a joint committee informed

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[1] Sen. Doc., 31 C. 1 S., no. 74, where the constitution is given in full.

[2] Sen. Doc., 31 C. 2 S., no. 1, pt. ii, p. 93.

[3] Sen. Doc., 31 C. 2 S., no. 26, p. 16.

Colonel Munroe that both houses were organized and ready to receive any communication he had to make. In reply, the colonel said that he had nothing to communicate beyond what was contained in his proclamation of May 28.[1] For some reason the governor-elect failed to qualify, and the lieutenant-governor-elect took his place. July 4 he delivered his inaugural address as governor of New Mexico to the legislature, which had "met for the first time under the constitution just adopted by the people;" and a manly inaugural it was.[2]

July 8, "Governor" Alvarez sent a message to the "legislature" in which he made certain recommendations. This communication has an air of soberness, and probably is a fair index to the condition of the country. According to it the most pressing needs of the country were:[2] Laws to regulate the system of peonage, for the good of both the employer and the employee; stringent laws against the prevalent crime of larceny; a plan to summon jurymen to secure to litigants a fair adjudication of cases; and some system to prevent the delay of cases from term to term and to secure speedy, uniform, and regular adjudication. The general diffusion of knowledge through common schools was spoken of as the noblest gift of a new state to her people. A stringent law to punish "all public officers who may be so hardy, so lost to duty, as to attempt to curtail or to infringe the sacred right" of voting was recommended for consideration.

Colonel Munroe now seems to have become alarmed at the course political affairs were taking, and summoned the "governor" to a conference. Several letters were exchanged, July 11-13, in which the rights of each in the premises were discussed at some length.

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[1] Sen. Doc. 31 C. 2 S., no. 1, pt. 2, pp. 94 *et seq.*

[2] *Ibid.*, 31 C. 1 S., no. 76, pp. 5 *et seq.*

Alvarez first gave Munroe official information that he was proceeding to put the state government into operation and had nominated the officers provided for by the constitution. Thereupon Munroe called his attention to the restrictions imposed in the proclamation of May 28, and declared that, according to the principles of the Constitution, the decisions of the Supreme Court, an extract from a decision of the Supreme Court which had been transmitted, and the laws of Congress, the nomination of officers to supersede those then in commission was an act unwarranted by law. He then announced that he would, with all the means at his disposal, support the existing government until it was superseded by one legally constituted.

In reply, the "governor" said that the election might have been held under the proclamation of a private citizen as well as under that of the military commandant, who had no authority whatever in civil matters. The proclamation had no binding force. Quotations were given from two of President Polk's messages, and from Secretary Crawford's report of November 30, 1849, as well as a reference to Colonel McCall's instructions, in support of the view that the legality of the military, or temporary civil, government ceased with the treaty of peace. Since that time it had only been continued on the "presumed consent of the inhabitants." "That consent," he continued, "is now withdrawn." He then cited the formation of a state government in California as a precedent, and announced his determination to proceed with the work of organization. The work of reform, so far as a change in the *personnel* of the government was concerned, he declared had already been effected quietly and satisfactorily, and no collisions would occur, unless provoked by military interference.[1]

The "legislature," in view of the fact that a letter signed by John Munroe, styling himself civil and military governor of New Mexico, had expressed a determination to maintain the civil authorities previously administering the government, and had threatened the use of force to resist the effective operation of the state government now in complete organization, resolved that the contentions of "Governor" Alvarez were correct and that he should be supported.[2] They also proceeded to enact laws—among them, to procure a state seal, and to regulate the election of state officers and of United States senators. Senators were then elected and a memorial prepared for presentation to Congress.

September 12, 1850, "Senator" R. H. Weightman addressed this memorial, together with that of the convention, and some other papers to the President of the Senate. The memorial contained a rather severe arraignment of the treatment accorded to New Mexico. It represented that, by the treaty of Guadalupe Hidalgo, the faith of the United States had been pledged to protect the people of New Mexico in their lives, liberties, property, and the free exercise of their religion; and in one year to invest them with the rights of citizens of the United States, with all their privileges and immunities, not one of which promises had been kept, "owing to disturbing causes which have embarrassed the action of Congress." The memorial continued:

> The existing government is indefinite and doubtful in its character, inefficient to enforce its laws for the welfare of the people, and unable to protect them against the Indians, because

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[1] Sen. Doc., 31 C. 2 S., no. 1, pt. ii, 95 *et seq.* [2] *Ibid.*, 105 *et seq.*

of which industry is paralyzed, and discontent and confusion prevail throughout the land.

Since February 2, 1848, we have groaned under a harsh law forced upon us in time of war when we were thought undeserving of confidence.

The military is independent of and superior to the civil power.

We have no voice or influence in making the laws by which we are governed. Some power other than the Congress of the United States has subjected us to a jurisdiction foreign to the constitution, and unacknowledged by our laws.

We are taxed without our consent, and the taxes, when collected, are not appropriated for the public benefit, but are embezzled by officers irresponsible to the people.

Judges are unlearned in the law. Prefects and alcaldes impose fines and incarcerate without the intervention of juries.

Alcaldes assail the right of the people freely to exercise their religion without restriction, and dictate to congregations what priests shall administer the sacraments of the church.

We have been encouraged by the President to set up a state government, and in so doing have done nothing inconsistent with respect to the Government of the United States.

In presenting the prayer for statehood, "Senator" Weightman used high-flown language about freedom and tyranny, and quoted the Declaration of Independence and the Constitution to the effect that Congress had not the right, though they might have the power, to deny the petition. Exercise of the power would be tyranny. The colonial system had been represented to his people as repugnant to the Constitution and laws of the United States. The question of the capacity of the people of New Mexico for self-government was not a subject for discussion, as the doctrine of the incapacity of the people was not of republican, but of monarchial origin.[1]

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[1] Sen. Doc., 31 C. 1 S., no. 76.

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Following the "senator" to Washington has carried us a little in advance of affairs in New Mexico. There government by proclamation and counter-proclamation was still going on. July 20, "Governor" Alvarez, in virtue of an act of the "legislature," approved July 12, ordered an election to be held the second [Monday] of August to fill the county offices. Three days later Vigil, who, though he had sat in the constitutional convention, continued to act as secretary under the military government, ordered the prefects to disregard this proclamation and to transmit to him any further communications from the same source. August 8, the "governor," by virtue of a joint resolution of July 15, issued a proclamation to the effect that no officer elected, or thereafter to be elected, or holding by appointment under the state of New Mexico, should attempt to exercise the functions of his office until after November 1, 1850, or until duly commissioned to act as such. The next day Secretary Vigil came out with another circular to the prefects in which they were ordered not to oppose, or take any part in the election of August 12, in their official character; neither were they to recognize any person elected as having any right to office until the matter was sanctioned by competent authority.[1] While these papers were signed by Vigil, they were issued "by order of John Munroe, military and civil governor of the Territory of New Mexico."

In reporting (July 16) to Washington the resolutions of the "legislature" endorsing the action of the "governor," Colonel Munroe took occasion to say that the New Mexicans in the "legislature" would have adopted a policy of reasonable delay, had not opinions been prepared for them there by those who had no ties binding them to the territory, except the possession and expectation of office, and who, if any serious consequences arose from the adoption of their advice, would be found safely beyond its limits.[1]

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[1] Sen. Doc., 31 C. 2 S., no. 1, pt. ii, 102 *et seq.*

When this communication was received it was submitted to President Fillmore, who directed the Secretary of War, Mr. Conrad, to make a reply (September 10), the substance of which was: It is desirable to keep the civil and military departments of the government separate and distinct. Temporary departure from this principle may be required occasionally, but it should close with the passing of the necessity. No necessity now seems to exist in New Mexico. The government formed was without authority of Congress, but its members do not appear to have any designs of acting against the United States, hence the President does not feel called upon to suppress it by military force. He regrets the misunderstanding which has arisen there, but Congress yesterday provided for a territorial government, and this will be put into operation as soon as possible. This government is conditioned upon the agreement of Texas to the proposed boundary. Meanwhile you will abstain from all further interference in the civil or political affairs of New Mexico, unless the inhabitants, or a portion of them, should demand of you the protection guaranteed by Article IX of the treaty of Guadelupe Hidalgo.[2]

This certainly was a remarkable order. The colonel was directed not to meddle with civil and political affairs, but no order was given as to who should direct the affairs of the territory. Had the military dissolved, the only thing left would have been the Alvarez "state" government. Now the act of Congress creating a territorial government had robbed this body of all possibility of subsequent legalization. President Taylor had told the people that they might set up the machinery of a state government, subject to legalization in the form of admission to the Union by act of Congress. But here President Fillmore seems to go further and say that the people of a territory not yet organized by an act of Congress have the right to alter or abolish the existing government and institute a new one, "laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." Not even Mr. Douglass could have improved upon this except by saying that "popular sovereignty" was a right which not even Congress could abridge.

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[1] Sen. Doc., 31 C. 2 S., no. 1, pt. ii, p. 92.

[2] *Ibid.*, 107 *et seq.*

However, in spite of these instructions, the colonel still continued to style himself "civil and military governor." The Alvarez government appears to have dissolved without causing any further trouble.

The agreement of Texas to the proposed boundary was transmitted to Congress December 13, 1850. The territorial government of New Mexico went into operation about March 3, 1851, at which time the civil functions of the commanding officer ceased.[1]

The territorial legislature recognized the former military government by passing acts (June-July, 1851) articulating the new government with the old. A great part of the Kearny Code was adopted, and remains in force to this day. Provision was made that bonds, writs, and processes begun in the courts established under it should be carried to final adjudication in the new courts as they would have been in the old.

Quotations have been given here and there which show that many thought that the legality of the provisional military government ceased with the treaty of peace. Presidents Polk and Taylor thought that the *de facto* government continued of necessity, but President Fillmore seems to have thought that even this basis of legality had vanished when the people organized a government for themselves. Upon the general question of legality after the treaty of peace, without any reference to Fillmore's position, we have a deliverance from the Supreme Court.

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[1] Ex. Doc., 32 C. 1 S., no. 71, p. 2.

The case in question arose under a law embodied in the Kearny Code, the details of which do not concern us. July 30, 1849, suit was instituted under this law by James J. Webb against Eugene Leitensdorfer and Joab Houghton, the last named a member of the supreme court of the military government. By various delays judgment was deferred until the territorial courts were organized. In September, 1851, the case was transferred to one of the new courts, where judgment was rendered in favor of the plaintiff. On appeal, this judgment was affirmed by the supreme court of the territory. The case was now carried on a writ of error to the United States Supreme Court. There the defendants, now the plaintiffs in error, appear to have held that, whatever may have been the rights of the conqueror as such, these were all terminated by the termination of hostilities, and that with the close of the contest every institution which had been overthrown or suspended was revived and re-established. Mr. Justice Daniel, in delivering the opinion of the court, said:

> The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, nor restored to its original condition of allegiance, but was retained by the occupant until possession was matured into absolute

permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the Territorial Government in the exercise of powers delegated by Congress.[1]

II. Review of the Military Régime

One of the first things promised the people of New Mexico was protection in life, liberty, and property, but the failure to provide this very protection was the principal indictment against the military government in the various petitions sent to Congress. And these complaints are well sustained by official testimony.

Not long after the suppression of the insurrection the Indians began to give trouble. July 5, 1847, an officer at Santa Fé says: "The Indians are depredating on the citizens in every direction, and no steps have been taken to suppress their incursions; they have become very bold, and a day or two since drove off many animals eleven miles from this place."[2] A few weeks later (September 18) Thomas Fitzpatrick, who, as Indian agent, had traveled over parts of New Mexico, wrote: "New Mexico is in a deplorable condition. The Indians are ravaging the country and carrying off inhabitants to a much greater extent than heretofore. They carry their hostilities (which seems very strange) almost within gunshot of the headquarters of the army of the west, except when they want presents, when they are as gentle as lambs." [1]

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[1] Leitensdorfer *vs.* Webb, 20 Howard, 176 *et seq.*

[2] H. Ex. Doc., 30 C. 2 S., no. 1, p. 220.

What really appeared strange to Mr. Fitzpatrick seems to have been the wretched discipline maintained among the troops. They were few enough in number to begin with, and this condition subtracted the more from their efficiency. An effort was made to remedy the lack of a sufficient force by giving permission to the people of New Mexico to march against the Navajoes. After the treaty of peace they were commanded to organize and hold themselves in readiness to march against the Indians, repel incursions, and rescue stolen property.[2] Toward the close of 1848, Colonel Washington reported a state of comparative peace and quietude, but in the following spring the Indian raids broke out afresh and he had to call for more volunteers. The New Mexicans responded readily, and four companies were mustered into service. With the force now at his command Colonel Washington made a rather lengthy campaign and succeeded in bringing the Navajoes to terms with a treaty.[3]

But in 1850, the "legislature" complained that the Indians were again robbing, killing, and carrying the people into captivity. About the same time Colonel McCall reported a deplorable condition of affairs. He declared that the population had decreased somewhat in the last six years. Mining, stock-raising, and agriculture were the chief pursuits; but little was then being done in the first, while the second was much decreased—both because of Indian raids. Hillsides and plains formerly covered with sheep had become bare, so that less than a thousand sheep were sent from districts which formerly sent them by the hundred thousand. Still the plundering went on, chiefly by Navajos and Apaches, even in the close vicinity of the military posts. The Indians pounced down and were away before the loss was known. Within three months between fifteen and twenty thousand sheep and several hundred cattle had been carried off. Statistics were hard to obtain, but it seemed certain that eighty-three people had been killed and thirteen captured, and these numbers might be safely increased by from fifteen to twenty per cent. The property loss (chiefly in sheep, mules, cattle, and horses) was estimated at $114,050, which should be increased by fifty per cent.[1]

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[1] H. Ex. Doc., 30 C. 1 S., no. 8, App., 240.

[2] H. Rep. Com., 36 C. 1 S., no. 537.

[3] H. Ex. Doc., 31 C. 1 S., no. 5, pp. 104 *et seq.*

The letters written by Mr. Calhoun from Santa Fé in the latter part of 1849 made no direct charges against the military, but one can easily read in them hints at criminal inactivity on the part of Colonel Munroe.[2] One cause of Indian activity he finds in the traveling merchants and "wicked priests," who were inciting them to rapine and murder with tales of Mexican reconquest and threats of extermination of all found claiming the protection of the United States.[3]

The day following the date of Colonel McCall's letter, Colonel Munroe sent in a report, from which we have already quoted. In this he also said: "As charges, both general and specific, have been made, and will be urged at Washington, against those who have administered the affairs of this Territory, an investigation into their conduct is due both to the people and themselves. If such an investigation should be ordered, I am satisfied it will be shown that the persons and property of the inhabitants of

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[1] Sen. Ex. Doc., 31 C. 2 S., no. 26, pp. 5 *et seq.*

[2] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 228 *et seq.*

[3] *Ibid.*, 220.

New Mexico have been protected to the full extent of the guarantee provided by the treaty with Mexico."[1]

A few weeks after he ceased to act as governor, Colonel Munroe used some strong language about the various statements emanating from persons in the Territory and circulated in the public prints of the United States, statements which, he declared, teemed with direct violations of truth, or with gross misrepresentations intentionally made, having in view the disparagement of the military force and more particularly the commanding officers. The object of this was, he thought, to prepare the public mind and Congress to consider favorably the claims proposed to be set up for the payment for all the stock which had been, or which would be represented to have been, driven off by the Indians through the supposed neglect of the government to give the protection which had been promised to the people of the Territory. Another object was to disparage the regular army, in the expectation that Congress would authorize the creation of a local force as a substitute, or partial substitute, the official positions of which there was already a surplus of aspirants ready to fill.[2]

Possibly there was some justification for the last charge. August 31, 1851, Mr. Calhoun, then governor, wrote the Secretary of War that there would be no quiet in the Territory until the Executive was authorized to call out the militia.[3]

Several months before Colonel McCall's report was written, President Taylor said: "It is undoubtedly true that the property, lives, liberties, and religion of the people of New Mexico are better protected than they ever were before the treaty of cession."[1] Possibly later reports would have caused him to change his opinion. It is true that the plundering had been going on for a long time—twenty years, according to Colonel McCall. The Navajoes, said he, gave as their only reason for not exterminating the New Mexicans long before that it was to their interest to keep them as shepherds. But the evidence goes to show that the losses sustained at the hands of the Indians had increased considerably within the last few years.

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[1] Sen. Ex. Doc., 31 C. 2 S., no. 1, pt. ii, 92.

[2] Sen. Ex. Doc., 32 C. 1 S., no. 1, p. 127.

[3] *Ibid.*, 36.

Yet even this may have been true and the fault not have been wholly that of the commanding officer. The military force at his disposal was never adequate, and this fact was constantly kept before the administration. While the war with Mexico lasted only small garrisons appear to have been kept in New Mexico. A few reinforcements were sent in, but the force was again weakened by withdrawals and by the return home of volunteers whose term of enlistment had expired. Colonel Washington made his expedition in 1849 with only 325 men, of whom 54 were Pueblo Indians. About the close of that year only 885 were stationed in the seven posts occupied in New Mexico.[2] Later the number was raised to 1,739, but this force Colonel McCall declared insufficient by about 500 men. The failure to respond to these repeated calls for more troops reveals a reprehensible carelessness on the part of the administration, if more troops were to be had; if not, it accentuates the folly of waging a war of conquest with volunteers whose term of enlistment expires with the treaty of peace.

But with all this, it must be remembered that to protect from savage foes whom it is not allowed to exterminate is no easy task. The depredations of these Indians have continued at intervals down to times within the memory of men still young, and our government has hardly been accused of negligence in dealing with them.

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[1] Message of January 23, 1850.

[2] Sen. Ex. Doc., 31 C. 1 S., no. 1, p. 184.

The charges against the judicial arm of the government have already been quoted. How far these generalizations were true it is impossible to say. That one member of the supreme court was not above taking advantage of the technicalities of the law is shown by the position assumed by Joab Houghton as one of the defendants in the case of Leitensdorfer *vs.* Webb, referred to above. One is not surprised to hear that the judges were unlearned in the law. Indeed, it is doubtful if many of the citizens had much learning in the law or anything else, if we may trust Colonel McCall as authority. If any of the judges were Americans, it was hardly to be expected that they should have any profound knowledge of the Spanish law.

Incarceration without a jury was nothing new to the Spanish law, but Kearny's Organic Law provided that the right of trial by jury should forever remain inviolate, and his laws provided a regular plan for summoning jurors. Curiously enough, we find "Governor" Alvarez, in July, 1850, calling the attention of the "legislature" to the need of a plan for this very purpose. This would seem to indicate that he did not know of the provision in the Kearny Code, or else chose to ignore it. It also suggests that possibly the law had not been strictly observed. That some juries had been summoned is well attested. The insurrectionists of 1847 were tried by jury. At least one civil suit decided by a jury came up on appeal before the supreme court of the Territory as organized by Congress. The original decision was affirmed, with only a slight correction in the amount for which judgment was rendered.[1]

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[1] 1 N. Mex. Reports, 19 *et seq.*

The charges against the prefects and alcaldes, so far as related to their dealings with the Pueblo Indians, are substantiated by official evidence. Said Mr. Calhoun: "It is a matter of no moment whether an Indian is in debt or not; a judgment can be obtained against him, which must be paid in cash, or the spirit of the 6th article of the ordinance of 1787 is immediately violated. Again, the prefects . . . do not, in my opinion, use their authority, whatever it may be, without abusing it. Contributions upon their [the Pueblos'] labor and property are frequently made by the law, or laws, which alcaldes and prefects *manufacture* to suit the occasion." The charges, however, did not apply to all.[1]

Nothing has been found either to substantiate or to refute the charges against these officers in regard to interference with religious worship.

Financially the military régime appears to have been a dismal failure. The imposition of taxes without the consent of the law-making body, and the embezzlement of the public funds, were among the charges made against it by the "legislature" of 1850. We have already seen that a duty of six per cent. was levied on imports soon after the occupation and was continued until the treaty of peace.[2] From a letter written by Colonel Munroe, December 30, 1850, we learn that "$16,073.32 has been received into the Territorial treasury from the six per cent. and the twenty per cent. imposts, and expended for the general prosperity of the Territory."[3] Nothing else relating to the twenty per cent. impost has come to the notice of the writer. In 1849 the Secretary of War made a report of the Mexican Military Contribution Fund, but does not appear to have mentioned any funds collected or disbursed at Santa Fé.[1] They evidently were paid into the Territorial treasury and no report was made of them. The Kearny Code provided a more or less elaborate scheme of taxation, both municipal and Territorial. It probably was some of these taxes, the collection of which was resisted in the strip of country north of El Paso.[2] What was realized from this source is not clear. The sum of $12,098.64 was paid from the treasury on the salaries of civil officials. This seems to have formed no part of the $16,073.32 expended for the "general prosperity of the Territory," whatever that may have been; consequently it must have been raised from some source other than the imposts.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 216.

[2] *Supra*, 127.

[3] Sen. Ex. Doc., 31 C. 2 S., no. 71, p. 2.

The prosperity of the office-holders does not appear to have kept pace with that of the Territory, for Munroe's letter was accompanied by a tabular statement of salaries due the officers of the government, with an appeal for their payment as an act of long-deferred justice. The total amount due was represented as $31,562.37. This was for services up to March 22, 1851. Accounts were included for the United States district attorney and marshal, though these offices were considered abolished by the order of the War Department, January 11, 1847. Still the men were recommended to Congress for payment up to June 22, 1847, as they had discharged their duties in good faith. Secretary Conrad included $4,391.30 for the military officers acting in a civil capacity—evidently only the governors—bringing the total up to $35,953.67, to which he also added $650 for certain officers up to June 22, 1851, though these did not come under the military régime. Besides this there was due the territorial treasury the sum of $12,098.64, which had been used to pay salaries made payable by the

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[1] H. Ex. Doc., 30 C. 2 S., no. 47.

[2] *Supra*, 137.

Kearny Code at the treasury of the United States. A few of the officers had received their salaries in full, some only in part; others had received nothing. The salaries ranged from $2,000 per annum down, the highest being that of the governor.[1]

In 1852 the Senate asked why these accounts had not been paid out of the balance in the treasury belonging to the Mexican military contribution fund. To this Secretary Conrad replied that he knew of no authority in his or any other department to make such payment.[1] July 17, 1854, Congress authorized the Secretary of War to pay the officers from September 22, 1846, to March 3, 1851, at the rate fixed by the Kearny Code, deducting such sums as had already been paid by the Territory, and allowing nothing to military officers for performing civil functions. The Territorial treasury does not appear to have been reimbursed for the accounts already paid.

The individual claims for service against the Indians were settled much earlier. February 27, 1851, Congress appropriated $135,530.20 to pay the New Mexican volunteers who had served in the Territory. Other claims arising from this service, believed by Secretary Belknap to be fraudulent, were before Congress as late as 1874.[2]

One thing seems certain, that the Territorial treasury was not left in a flourishing condition. October 19, 1851, Mr. Calhoun reported that there was not a dollar in it, and that the collection of taxes was resisted, with no prospect of an early adjustment of the question.[3]

As to the moral influence of the military, the testimony is a little conflicting—or perhaps we should say that the direction and character of the influence changed. Mr. Fitzpatrick, in the letter already quoted,[1] said: "Many are surprised at the death-rate of the volunteers in a climate known to be so healthy. Let them observe for one week the life led in Santa Fé and they will be astonished that so many have lived." The troops then at Santa Fé were the Missouri volunteers, who had enlisted for only one year. At the expiration of their service they went home, leaving no very savory reputation behind them, and were replaced by others. Whether the new troops were less subject to temptation, or were better disciplined, or whether there was any difference in their conduct, the writer cannot say, but later evidence is to the effect that general moral and social conditions showed some improvement.

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[1] Sen. Ex. Doc., 32 C. 1 S., no. 71, pp. 1 *et seq.*

[2] See H. Rep. Com., 36 C. 1 S., no. 537; H. Ex. Doc., 43 C. 1 S., no. 272.

[3] Sen. Ex. Doc., 32 C. 1 S., no. 71, p. 3.

September 4, 1847, the first English newspaper was started at Santa Fé. A little more than two years later the first number of the *New Mexican,* which is still published, made its appearance. In December, 1847, Governor Vigil devoted one section of his message to the legislature to the educational needs of the country. In the following August the first English school was opened at Santa Fé, and the next year another was opened by a Baptist missionary.[2]

Not quite four years after the conquest Colonel McCall, in the report already quoted several times, said: "Changes in the habits and customs of the natives, due to intercourse with our people, are already perceptible. This is shown in Santa Fé in the diminution of filth in the streets, improved dress and personal cleanliness of the people, together with the cloaking of immorality, showing that precept and example are not altogether thrown away upon them."

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[1] *Supra,* 149.

[2] N. Mex. Blue Book.

CHAPTER III

THE OCCUPATION OF CALIFORNIA

I. The First Conquest and Reorganization

The first avowedly official operations in California were conducted by naval officers in pursuance of orders issued June 24, 1845, in anticipation of a rupture with Mexico. The orders were directed to Commodore John D. Sloat, commanding the United States naval forces in the Pacific, who, in case of the rupture, which he was to do everything consistent with national honor to avoid, was to seize San Francisco and blockade or occupy such other ports as his force would permit. He was particularly enjoined to preserve friendly relations with the people of California and to encourage them to adopt a course of neutrality.[1] In later instructions (May 15, July 12, and August 13, 1846) the object of preserving friendly relations with the Californians was again emphasized by Mr. Bancroft, the Secretary of the Navy. The government desired to be in actual possession of Upper California at the close of the war, so as to be able to claim it on the basis of the *uti possidetis*. This was thought to necessitate a civil administration, which Commodore Sloat was directed to establish under his protection. In doing this he was to pay due respect to the wishes of the people of California, as well as to the actual possessors of authority in that province. The oath of allegiance to the United States might be exacted of those entrusted with authority. In short, the people were to be "allowed as much liberty of self-government as was consistent with the general occupation of the country by the United States."

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[1] H. Ex. Doc., 29 C. 2 S., no. 19, pp. 75, 79 *et seq.*

Only the orders of June 24 reached Commodore Sloat before he went to California, but it is only fair to assume that he was reasonably familiar with the course which the administration desired to have pursued there. Certainly he knew the treatment which was to be accorded the Californians in case they were well disposed toward the United States, which was believed to be the case. The reader will do well to hold this in mind in connection with later developments.

About the first of June, 1846, Commodore Sloat received at Mazatlan reliable information that hostilities had begun, and immediately sailed for California. July 2 he arrived in the harbor at Monterey and prepared to take possession of the town. Before landing, a general order was read to the marines, informing them that it was of the first importance to cultivate the good opinion of the inhabitants, whom it was desired to conciliate. No act of hostility was to be committed without express orders from the commanding officer, nor was any one to leave the ranks or enter any home without similar authority. The landing was effected July 7, with two hundred and fifty men, and possession was taken of the town without opposition. A proclamation to the inhabitants of California was read at the custom-house, and the United States flag was hoisted "amid three hearty cheers by the troops and foreigners present." [1]

In the proclamation the commodore assures the people that, though he comes "in arms with a powerful force," he does not come as an enemy, but as their best friend, and informs them that "henceforward California will be a portion of the United States, and its peaceable inhabitants will enjoy the same rights and privileges as the citizens of any other portion of that territory, with all the rights and privileges they now enjoy, together with the privilege of choosing their own officers for the administration of justice among themselves, and the same protection will be extended to them as to any other state in the Union." Religious freedom is promised and an era of prosperity is predicted. Such of the inhabitants, native or foreign, as are not disposed to "accept the high privileges of citizenship" will be allowed to dispose of their property and depart in peace; or to remain, if they will observe a strict neutrality. "With full confidence in the honor and integrity of the inhabitants of the country," "the judges, alcaldes, and other civil officers" are invited "to retain their offices, and to execute their functions as heretofore, that the public tranquillity may not be disturbed; at least, until the government of the territory can be more definitely arranged." Provisions would be paid for at fair rates.[1]

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[1] H. Ex. Doc., 30 C. 2 S., no. 1, p. 1006 *et seq.*

A more pronouncedly "peace policy" it would be hard for a conqueror to pursue. Under Sloat's direction the same course was followed at San Francisco and in the north generally by Commander Montgomery. The militia were organized and supplied with arms to protect their persons and property, and with the flag of the United States. The revolutionists at Sonoma were quieted, and an effort was made, but without success, to get into communication with Captain J. C. Fremont, of the United States topographical engineers, who was known to be operating in the north.

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[1] H. Ex. Doc., 30 C. 2 S., no. 1, p. 1010.

On the same day that Monterey was entered, Commodore Sloat summoned Don José Castro, commandant-general of California, to surrender, and invited him to a conference at Monterey. Two replies were received from Castro. One called attention to the barbarous practices of the adventurers under Captain J. C. Fremont, and expressed the belief that they could not belong to the commodore's command.[1] The other declared that the governor and assembly would have to be consulted in regard to the surrender, but as for Castro himself, he would stand by the Mexican cause as long as a single individual would join him in it.[2] Sloat then invited Governor Pico to a conference at Monterey, in order that he might satisfy the governor and the people that the Americans had come as their friends; and he also gave an assurance that everything in his power had been done to stop the sacrifice of life "by the party in the north."

At the request of the foreigners at San José, a flag was furnished to be hoisted there, and a justice of the peace was appointed to preserve order in the town, the alcaldes declining to serve. Captain Fremont was found in possession of St. John's and was left there to dig up the guns buried by Castro and to garrison the place. July 23, Montgomery was advised to appoint two justices of the peace at San Francisco to administer justice in minor matters, with directions to conform to the existing laws of the territory. Further than this Commodore Sloat does not seem to have gone either in the work of conquest or organization. The same day he yielded the command on shore to Commodore Stockton, and a few days later left California on account of ill health.

The departure of Commodore Sloat marks the beginning of a more "vigorous foreign policy." The first thing the new commander, Stockton, did was to organize the "California battalion of mounted riflemen," under Captain Fremont and Lieutenant Gillespie, and send them off to San Diego to cut off Castro's retreat into Mexico. This must have been done with Sloat's approval, certainly with his acquiescence, since he had not left the harbor. July 28, an "Address to the People of California" was ready, in which the influence of Fremont is clearly discernible. It begins with a severe arraignment of the Mexican government in general, and of General Castro in particular, who is accused of having "violated every principle of international law and national hospitality, by hunting and pursuing, with several hundred soldiers, and with wicked intent, Captain Fremont, of the United States army, who came here to refresh his men (about forty in number) on a scientific survey." "For these repeated hostilities and outrages, military possession was ordered to be taken of Monterey and San Francisco until redress could be obtained of the government of Mexico." There was no intention to interfere with the civil authorities, the commodore continued, but they had abandoned the people to a state of anarchy. Abuse was then heaped upon General Castro as a usurper, and he was practically denounced as an outlaw. In closing, the commodore declared that he did not desire to possess himself of one foot of California for any other reason than to protect the lives and property of the foreign residents and citizens of the territory who had invoked his protection, and that he would withdraw as soon as the officers of the civil law returned to their duties under a regularly organized government.[1]

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[1] H. Ex. Doc., 30 C. 2 S., no. 1, 1012 *et seq.*

[2] Sen. Ex. Doc., 29 C. 2 S., no. 1, p. 647.

This pronunciamento, in which the commodore held out the sword and the olive branch in the same hand, must have been confusing enough in itself; it was rendered still more so when read in connection with the one issued by Sloat a few days before. Sloat himself declared, as soon as he read it, that it did not express his reasons for taking possession of California, nor his intentions towards that country.[1] Nobody knew that war had been declared, but Sloat acted on the presumption that the hostilities of which he had heard meant war. If the "reports of rapine, blood and murder" were the causes of Stockton's intervention, the logical course for him to pursue would have been to chase the murderers, instead of driving out the officers of the civil government, on the reëstablishment of which he promised to withdraw. One of his objects was to prevent the extermination of the American settlers and immigrants, which had been threatened in a proclamation. The commodore also tells us his reason for refusing to enter into negotiations with General Castro, who demanded as a preliminary that he should advance no farther. The Mexican government had not authorized the local functionaries to treat, consequently their action could not have been final. Nor would it have been wise to stop the American arms, and thus give the enemy a chance to recuperate and drive them out of the country—a country with which they were not at war, and in which their only object was to restore public tranquillity! Besides, it was rumored that the officials would dispose of the public domain and property in anticipation of the American occupation, and "to prevent that was one of the chief objects" of the expedition against them.[2]

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[1] H. Ex. Doc., 30 C. 2 S., no. 1, p. 1035 *et seq.*

Some time about the middle of August news was received of the actual declaration of war, and after that the commodore's actions and proclamations are more comprehensible. By August 28, he was able to inform the Secretary of the Navy that the flag of the United States was flying from every commanding position in California. How that was accomplished was summed up in a somewhat verbose and bombastic paraphrase of Cæsar's famous dispatch. He also assured the secretary that a civil government had been put into successful operation.[1]

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[1] H. Ex. Doc., 30 C. 2 S., no. 1, p. 1034.

[2] *Ibid.*, 1037 *et seq.*

This "proclamation government" was set up at Los Angeles in a series of papers issued about the middle of August. One of these reads:

> I, Robert F. Stockton, commander-in-chief of the United States forces in the Pacific Ocean, and governor of the Territory of California, and commander-in-chief of the army of the same, do hereby make known to all men, that, having, by right of conquest, taken possession of that territory known by the name of Upper and Lower California, do now declare it to be a Territory of the United States, under the name of the Territory of California.

The proclaimer, continuing, "ordered and decreed" a regular territorial government, with a governor and secretary to hold office four years, and a legislative council to hold for two years, unless sooner removed by the President of the United States. Municipal officers were directed to regulate their proceedings by the Mexican laws until otherwise provided by the governor and council. A separate address to the people of California (August 17) requested them to meet and elect officers to fill the places of such as declined to serve. In case they failed to do so, the governor would appoint. All persons who would not agree to support the existing government were informed that they would not be permitted to remain in the territory. Until the civil government was put into operation, martial law would prevail, and during that time all persons were required to be within their houses from ten o'clock at night until sunrise.[1]

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[1] Sen. Ex. Doc., 29 C. 2 S., no. 1, p. 668.

The governor now turned his attention to revenue. All foreign vessels arriving in the ports of California were required (August 15) to pay tonnage duties at the rate of fifty cents per ton. Goods arriving from foreign ports were to be taxed fifteen per cent. *ad valorem,* payable in three instalments, at the end of thirty, eighty, and one hundred and twenty days. Two disinterested persons, one selected by the government and one by the owner of the goods, were to make the appraisement.

Without waiting for the voluntary elections, the governor ordered a general election to be held September 15, to elect alcaldes and other municipal officers.

Soon after this a general order was promulgated (September 2) looking to the organization of the army of California. The territory was divided into three departments, for each of which a military commandant was to be appointed. Superior to these would be a military commandant of the territory, subject to orders from the governor. Captain Fremont was appointed to this position, and Captain Gillespie was made commandant of the southern department.

The instructions to Captain Gillespie informed him that martial law would prevail throughout the territory until otherwise ordered by the governor. However, he was directed not to interfere with civil officers, except when the public peace and safety demanded it. One part of his task was to see that the proclamation of August 17 was strictly observed, but he was authorized to grant written permits to disregard the curfew regulation. In case the people failed to elect prefects and alcaldes, he was directed to appoint them.[1]

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[1] Sen. Ex. Doc., 29 C. 2 S., no. 1, p. 669 *et seq.*

Having completed the civil organization, Commodore Stockton now decided to leave the government in Captain Fremont's hands and seek other fields of conquest. Accordingly, the captain was informed of his intentions and ordered to meet him at San Francisco, October 25, that they might there complete the arrangements.

A report of his proceedings was now (September 19) transmitted to the Secretary of the Navy, with the statement that, if the government approved of them, a publication of such approval in the *Californian* would have a good effect.[2] No reason appears to have been given at this time for what had been done. About eighteen months afterwards, in defense of his conduct, which was then called in question, the commodore said:

> It appeared to me that the existence of such a government, under the authority of the United States, would leave no pretence upon which it might be urged, that the conquest of the country had not been accomplished. While merely the military power exercised power, enforcing its authority by martial law, and executing its functions through the instrumentality of a regular military force, nothing could be regarded as settled, and opposition to its power would be considered as a lawful opposition to a foreign enemy. When, however, the whole frame of civil administration should be organized—courts and judges performing their accustomed functions—public taxes and imposts regularly collected and appropriated to the ordinary

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[1] H. Ex. Doc., 30 C. 1 S., no. 70, pp. 43 *et seq.*

[2] *Ibid.*, 2 S., no. 1, p. 1044.

objects and purposes of government—any opposition might be justly deemed a civil offence, and appropriate punishment inflicted in the ordinary course of administering justice.

He further thought the law military (meaning martial law) inadequate, there being many objects over which it could not exercise a salutary control. But a civil government which should, through its various functionaries, pervade the entire country, seemed essential to the attainment both of the objects which he had in view and of the ends of the government. He further wished to subordinate the military to the civil, its proper position, to accustom the Californians to our institutions, and to give to Americans the law and justice they had enjoyed at home.[1]

II. California at the Time of the Conquest

The California of 1846 may be regarded as substantially the same geographically as the California of to-day, though the eastern boundary had not then been marked as it now stands. Very little of it except the west coast will play any part in the events to be narrated. The historian Hittell estimated the population at 5,000, of whom 4,000 were Californian descendants of Europeans and 360 Americans from the United States.[2] Bancroft's estimate is a little higher, but appears to have been made up in a different way. Accurate statistics were not to be had. The small population was scattered along the coast from San Francisco in the north to San Diego in the south. Monterey, the capital and chief commercial city, had a population of 750; outlying settlements brought the population of the district up to 1,950.[3]

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[1] H. Ex. Doc., 30 C. 2 S., no. 1, p. 1043.

[2] *Hist. Cal.*, ii, 469 *et seq.*

[3] Bancroft, *California*, iv, 650.

The inherited Spanish love of pleasure was everywhere evident. The Rev. Walter Colton, who accompanied Stockton to California as a chaplain in the navy and served as alcalde at Monterey, says that so many devoted their Sundays to the bottle and to dancing that few were left for the church, though some attended mass before dressing for the ball.[1] They had few advantages in education, but made up for this in part by a natural quickness of wit. In hospitality they were as free and open-handed as the South in the olden time. Marriages were contracted in youth and families were large, several of more than twenty members in each being on record. The life was largely pastoral, and the rancheros measured their possessions by leagues. They were reputed to be passably honest, though a little slow in settling with foreign traders.

In religion the Californians were Catholics; in politics they were revolutionists. This habit of changing their government so often makes it a little hard to describe the political system. Not every change of leaders was followed by a change in the system, but such changes were frequently made. The country was a department of Mexico and was entitled to representation in the Mexican Congress. It had a governor, when not in the hands of a military usurper, and usually a departmental assembly, but the governor not infrequently issued regulations and orders which had the force of law. The pay and glory of assemblymen could not have been very great, for we find them excusing themselves from attendance on various pretexts; not long before the American occupation they adjourned and went home to earn a living. Sometimes there was a prefect (executive officer) for the districts, and sub-prefects for the smaller divisions; sometimes these offices were abolished for the sake of economy. The towns were supposed to be cared for by ayuntamientos. The law provided for a supreme court, and several attempts were made to organize one, but with ill success. Of the inferior judicial officers the alcalde seems to have been the most important. The total revenue from customs in 1845 was $140,000; yet at the end of that year the total indebtedness of California was about $158,000, none of which dated back more than two or three years. This probably accounts for hints thrown out by some that the government officials were dominated by other than patriotic motives.

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[1] *Three Years in California* (1850), 33, 46.

In addition to the home-bred revolutions, which were not always very sanguinary, there was another disturbing element in Californian life—the foreigner. The treatment accorded him was not always consistent; sometimes he was encouraged to come, sometimes to stay away, more often the former. He was looked upon with suspicion and fear, it being believed that he had designs upon the country. In the spring and summer of 1846 a few adventurers at the north showed that this fear had not been ill-grounded.

The story of the "Bear Flag Revolt," the inner history of which has always been wrapped in more or less mystery, has no proper place in this narrative.[1] It is mentioned here only because of the later prominence of one of its chief promoters, and because of the influence it must have had on later events. It will suffice here merely to say that certain lewd fellows of the baser sort, encouraged, if not actually instigated, by Captain J. C. Fremont, of the United States topographical engineers, ostensibly on a scientific expedition, raised the flag of revolt in the north and committed atrocities more common in the earlier stages of civilization. This was the event referred to in the correspondence between General Castro and Commodore Sloat. When Commodore Stockton assumed command the revolutionists were adopted by him, and when the work of conquest was supposed to be complete, announcement was made that this same Captain Fremont would be made governor of the territory. In consequence of the conflicting proclamations and incomprehensible acts already mentioned, it is not surprising that, in some cases, the inhabitants fled in terror before the Americans, not knowing what to believe, or what to hope.[1]

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[1] A very good, but somewhat tedious account of this disgraceful episode will be found in Royce's *California*.

It is not strange, then, that the Californians did not fall at the feet of the Americans and thank them for coming. Commodore Sloat thought that they abandoned all hope of ever seeing the Mexican flag again flying in California as soon as the British Admiral Seymour came in and declined to interfere.[2] Great satisfaction was reported to prevail at Sonoma among all classes.[3] Almost any condition would have been preferable to the reign of terror instituted there by the revolutionists. At Monterey real estate advanced in value immediately after the occupation, and at least one Californian expressed his satisfaction with the consequent increase of his own wealth to the extent of forty thousand dollars. But in reporting the completion of the conquest in September, Commodore Stockton said that many still hoped that, by some chance or accident, the United States would again give up California to Mexico.[4]

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[1] H. Ex. Doc., 30 C. 2 S., no. 1, pp. 1021, 1028.

[2] *Ibid.*, 1008.

[3] *Ibid.*, 1023.

[4] H. Ex. Doc., 30 C. 1 S., no. 70, p. 45.

III. The Revolt and Reconquest

The course of events soon showed that Commodore Stockton had good cause to doubt the security of his position. His dispatch announcing the completion of the conquest was but little more than a week old when news was received at Monterey that the southern district had risen in revolt and that Captain Gillespie was besieged at Los Angeles. The news reached Stockton at San Francisco, and he, now breathing out threatenings and slaughter against the rebels, immediately started for the scene of conflict.

The mere announcement that Captain Fremont was to be made governor ought to have been regarded by any man acquainted with the events of the three or four months preceding the announcement as a sufficient cause of uneasiness and discontent, if not revolt, on the part of the inhabitants. To them this must have seemed to be nothing more nor less than an official endorsement of the barbarities which they had laid at the captain's door. What then could they promise themselves under this man as governor? And yet this was not the immediate cause of the outbreak. Indeed, it began far away from the governor's camp, though near that of one of his lieutenants.

Although Captain Gillespie had been instructed to mitigate to some extent the harshness of martial law, the accounts generally agree that he began with a series of measures which caused him to be regarded as a tyrant. He forbade two persons to go about the streets together, and would not allow the people to have reunions at their homes under any pretext whatever. The provision shops were closed at sundown, houses were searched for arms, people were imprisoned on suspicion, and cases were decided by the captain instead of by the justices of the peace. The "bewildering speeches and proclamations," and "the banding together of a few mongrel bodies of volunteers, who enhanced the pleasures of their otherwise agreeable society by pillaging the natives of horses, cattle, *etc.*, in quite a marauding, buccaneering, independent way, all, of course, under the apparent legal sanction of the United States," were supposed to have had their effect.[1] That particularly galling manifestation of contempt which Americans frequently display toward other people as their inferiors also played a part. The trouble began when a turbulent fellow, Serbulo Varela, who had some trouble with Gillespie, or was unwilling to submit to the stringent police regulations, got up a band of a dozen or more kindred spirits and ranged about the vicinity of the town to annoy Gillespie's troops. Many arrests were made and the people found themselves branded as rebels. Flores, a paroled Mexican officer, narrowly escaped arrest and then joined the insurgents. The rising was popular, though probably fomented by the paroled officers, who now availed themselves of what they were pleased to regard as a breach of faith on the part of Gillespie to join the opposition.

The rising at the north does not appear to have been directly connected with the movement about Los Angeles, and the immediate causes for it were a little different from those operating in the south. The open revolt did not begin until December, when Alcalde Bartlett left San Francisco (Yerba Buena) to "purchase" supplies in the usual Fremont fashion, that is, by "taking" them from the rancheros.[2] One Francisco Sanchez, and a few others, who did not like this method of trade, captured Bartlett and his companions and decided to hold them as hostages. Colton tells us that those engaged in this undertaking were men of the better stamp—men who had a permanent interest in the country. "They stated that they had taken up arms not to make war on the American flag, but to protect themselves from the depredations of those who, under color of that flag, were plundering them of their cattle, horses, and grain; and that on assurance being given that these acts of lawless violence would cease, they were ready to return quietly to their homes." [1]

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[1] Bancroft, *op. cit.*, v, 306 *et seq.*

[2] *Ibid.*, 378 *et seq.*

The whole country may now be said to have been in a blaze, if it is not too great a stretch of rhetoric to apply that term to so vast a region with so few people. The Americans were threatened from San Francisco to San Diego. Flores summoned the departmental assembly, which met October 26, and, in the absence of Pico and Castro, elected him governor and commander-in-chief.[2] But the undertaking was almost hopeless from the beginning. Arms and ammunition were lacking; the camp itself was distracted with internal dissension, which actually led to the imprisonment of Flores for a few days; and the evaporation of patriotic zeal followed as a necessary consequence. A few successes were secured, the most notable of which were the expulsion of Gillespie from Los Angeles, and the battle at San Pascual (December 6) with General Kearny, who had just entered California, after a march of two thousand miles from Santa Fé, with a tatterdemalion company of about one hundred dragoons, and with Captain Gillespie, who had joined the general with about thirty-five volunteers. But the battle was not a decisive victory, resulting only in a check to the Americans, and on January 8 and 9 the contest was practically decided against the Californians in the engagement at San Gabriel river. Before this Flores attempted to negotiate with Stockton, but the only hope held out to him was that of being shot as a rebel, if caught.[1] After the battle Flores transferred the command to Andres Pico, in the hope that he could secure better terms of peace, and set out with Castro for Mexico.

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[1] *Three Years in California*, 152. [2] Bancroft, *op. cit.*, v, 327 *et seq.*

Captain Fremont now appears to have attempted to undo some of the mischief of his previous career by adopting a policy of conciliation. By some means Pico had found out that better terms could be secured from him than from Stockton and hastened to conclude a capitulation, January 13, 1847. The Californians agreed to give up their arms, to take no further part in the war, and to assist in placing the country in a state of peace and tranquillity. Captain Fremont, on the other hand, released all prisoners, including those on parole, promised protection to life and property, the right to leave the country without let or hindrance, that no oath of allegiance to the United States should be exacted until the conclusion of peace, and pardoned all who had violated their parole. The last in particular was displeasing to Stockton, but he created no disturbance about it.[2]

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[1] Bancroft, *op. cit.*, v, 403; Sen. Ex. Doc., 30 C. 2 S., no. 31, p. 19.

[2] *Ibid.*, 20 *et seq.*

CHAPTER IV

DIVISION OF THE SPOILS

I. THE QUARREL OF THE VICTORS

SCARCELY was the work of conquest ended when the victors began to quarrel over the spoils—if the governorship of such a country may be classed as spoils. Commodore Stockton does not appear ever to have had any instructions from Washington regarding the establishment of a civil government in California. The first mention of a civil government by the Navy Department is found in the instructions of July 12, 1846. This letter, addressed to Commodore Sloat, was received by Commodore Shubrick, and communicated to Stockton.[1] We have already seen that General Kearny had specific orders upon this point.[2]

Respecting the military operations, Stockton says that he repeatedly offered the supreme command to Kearny, "although it was my decided opinion that under the circumstances that existed I was entitled to retain the position in which I was placed as commander-in-chief," but that the general declined it.[3] How the "existing circumstances" could authorize a colonel—such being Stockton's rank on shore—to command a brigadier-general was not explained.

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 33, p. 197; *Life of Stockton*, Appendix, 30.

[2] *Supra*, 93.

[3] H. Ex. Doc., 30 C. 2 S., no. 1, p. 1050; Sen. Ex. Doc., 30 C. 1 S. (Fremont Court-martial), no. 33, pp. 189 *et seq.*

Kearny's reasons for declining were given in a statement to the commodore, "that deference and respect for his situation, he being then in command of the Pacific squadron, and having a large force of sailors and marines, prevented me at that time from relieving him and taking charge of the civil government of the country; that, as soon as my command was increased, I would take charge of affairs in California, agreeable to my instructions."[1]

Stockton's offer to put Kearny at the head of affairs in California would, by every rightful interpretation, have included the management of civil affairs, but it is very doubtful if such was the intent of the offer. Even if it was, Kearny was discreet in refusing, since he could not hope to pacify and maintain order in the country with less than one hundred men. The sailors and marines would only have been volunteers in his service, subject to withdrawal at any time. Even his right to command the California battalion (under Fremont) was later disputed, in spite of instructions from Washington that troops organized in California should be subject to his order. When Kearny submitted his instructions of June 3 and 18 to Stockton, the latter returned them, with copies of his own dispatches relating to the conquest and civil organization, "in order that he, as a friend, might participate in the pleasure I felt of having in anticipation executed the orders of the government."[2] But when Kearny suggested that those instructions meant that he should have the management of civil affairs, the commodore was "amazed." "Should you conquer the country, *etc.*, is the reading," said he in substance; "but I have already conquered the country and put the civil government into successful operation throughout the Territory, except at two places, where it is now only temporarily suspended by the insurrection. The wishes of the government have already been complied with. The state of affairs has already been reported, and I cannot permit any interference until an answer is received to that report." [1]

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[1] Sen. Ex. Doc., 30 C. 1 S. (Fremont Court-martial), no. 33, p. 82.

[2] *Ibid.*, 190.

Not having the power to enforce his demands and wishing to present an undivided front to the insurgents, Kearny yielded for the time being and volunteered to serve under the command of Stockton. He was then put in the immediate command of the troops, but Stockton went along as commander-in-chief. After the victories of January 8 and 9, each claimed that they had been won "by the troops under my command." [2] Nobody had in reality been executing any civil functions; now that the country was about to be pacified Kearny thought that the time had come to assert his rights and seized upon this opportunity to assert them as commander-in-chief. But Stockton denied that he had ever relinquished the supreme command and declared that Kearny was serving under him as a volunteer. The evidence shows that in this Stockton was right. On several occasions Kearny recognized him both as governor and as supreme commander, and even addressed him as such so late as January 13.[3] But he claimed that this recognition extended only to the fact that the commodore was "acting" in that capacity. Still this recognition was in fact so complete that Kearny could not rightfully claim any credit for the conquest of California, except as a volunteer under Stockton. Whether he had other rights was another question. Stockton's contention may be summed up in a few words: I conquered this country; whether the conquest was completed last September or on January 8 and 9, the work was all done by the troops under my command, and I intend to govern it by right of conquest. You [Kearny] must get out or remain as a peaceable sojourner.

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[1] Sen. Ex. Doc., 30 C. 1 S., (Fremont Court-martial), no. 33, pp. 82, 190.

[2] Sen. Ex. Doc., 30 C. 2 S., no. 31, pp. 25 *et seq.*

[3] Sen. Ex. Doc., 30 C. 1 S. (Fremont Court-martial), no. 33, pp. 322, 324, 108.

Affairs were now approaching a critical stage. January 15, 1847, Stockton addressed a letter to Mr. Bancroft, Secretary of the Navy, in which he said: "The Territory of California is again tranquil, and the civil government, formed by me, is again in operation in the places where it was interrupted by the insurgents."[1] He also announced his intention to withdraw and leave affairs in the hands of Fremont. Kearny did not know of this letter, but he was pretty well acquainted with the commodore's intentions. On the following day he sent a peremptory order to Stockton to cease his efforts at the organization of a civil government, a work which had been confided to himself in the orders of June 3 and 18, 1846, unless authority from the President could be shown for the same, in which event he would cheerfully acquiesce.[2] Stockton's reply was: "I cannot alter anything on your demand, which I will submit to the President, and ask for your recall. In the meantime you will consider yourself suspended from the command of the United States forces in this place" [Los Angeles].[3]

The precise meaning of the last sentence is not quite clear, but one thing is certain, Stockton meant to suspend Kearny from the command of the sailors and marines, which he undoubtedly had a right to do, the California battalion under Fremont, and possibly the dragoons which Kearny himself had brought! Colonel Fremont had arrived only two days before with about four hundred volunteers, and now Kearny sent a test order to him. A copy of the letter of June 18, in which it was stated that the troops organized in California would be subject to Kearny's command was endorsed, and directions were given that no change be made in the organization of the battalion without his approval being first obtained.[1]

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[1] Sen. Ex. Doc., 30 C. 2 S., no. 31, p. 21.

[2] *Ibid.*, 1 S., no. 33, p. 90.

[3] *Ibid.*, 118.

Fremont had long had his eye on the governorship and now trimmed his sails to catch the prize, whichever way the wind turned. Stockton had promised to deliver it at once. In response to a note from Kearny, the colonel now called upon him. In the course of the conversation his reply to the order just mentioned was brought in for him to sign. This he immediately did and handed it to Kearny. The last paragraph read: "I feel myself . . . . constrained to say that, until you and Commodore Stockton adjust between yourselves the question of rank, where I respectfully think the difficulty belongs, I shall have to report and receive orders, as heretofore, from the commodore." After reading this, Kearny offered to give it back and let him destroy this evidence of an insubordination which would prove his ruin. The question of the governorship was then broached, and Fremont afterwards declared, with apparently good grounds, that Kearny tried to win him and his battalion over with the promise of this office. But the most that Kearny said was that he expected to leave for the States in a few weeks and that he knew of no objections to appointing Fremont governor at that time.[2] But the nearer prize appeared the more alluring to Fremont, who, being already in possession of a commission from Stockton, persisted in his insubordination, though it does not appear how he imagined that a naval officer could ever shield him for such disobedience. Kearny, with less than one hundred men obedient to his command, realized his helplessness, and now informed Stockton that, in order to prevent collisions and a possible civil war, he would remain silent for the time being. The same day he reported the state of affairs to Washington and then withdrew with his dragoons to San Diego.

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 33, p. 5.

[2] *Ibid.*, 6, 39, 80, 94, 390 *et seq.*

Stockton's commission to J. C. Fremont, Esq., as "governor and commander-in-chief of the Territory of California," which, "by authority of the President and Congress of the United States of North America, and by right of conquest," had been taken possession of and declared to be a territory of the United States, was dated January 16, 1847.[1] The same day W. H. Russell was commissioned secretary of state. Commissions were also made out to seven gentlemen who were to constitute a legislative council, and they were, by proclamation, ordered to meet at Los Angeles, March 1.[2]

II. FREMONT'S ADMINISTRATION

Soon after the departure of Commodore Stockton, the California battalion was paraded to hear the announcement of the installation of the new government. January 22, the governor issued a proclamation announcing the restoration of peace under the treaty made between himself and Pico, requiring the immediate release of all prisoners and the return of all civil officers to their appropriate duties, and commanding on the part of the military as strict obedience to the civil authority as was consistent with the security of peace and the maintenance of good order when troops were in garrison.[1]

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 33; pp. 258, 410.

[2] *Ibid.*, 2 S., no. 31, pp. 23 *et seq.;* Bancroft, *op. cit.*, v, 433.

But in spite of this splendid beginning, the administration cannot be said to have been a very brilliant one. A somewhat humorous account of the situation was given by one of Kearny's officers, Colonel Cooke, under date of March 12. "General Kearny is supreme—somewhere up the coast; Colonel Fremont is supreme at Pueblo de los Angelos; Commodore Stockton is 'commander-in-chief' at San Diego; Commodore Shubrick the same at Monterey; and I at San Luis Rey; and we are all supremely poor, the government having no money and no credit; and we hold the territory because Mexico is poorest of all." [2]

As a matter of fact, however, Fremont was for a few weeks the *de facto* governor, though there is little record of the exercise of this authority outside the Los Angeles district. An effort was made to get the council commissioned by Stockton to accept, but without much success. No meeting of the council was ever held.[3] Authority was granted to raise more troops to constitute a second company of artillery in the California service, and an officer was dispatched to look after the defenses of San Francisco Bay.[4] Two collectors of the customs were appointed, one at San Diego and one at Santa Barbara. A license was granted to the brig *Preniovera,* under Mexican colors, "to trade on any portion of the coast of California, on terms and with the same immunities as merchant vessels of the United States,"[5] which privilege was revoked by Fremont's successor. A lengthy letter was addressed to the

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[1] Bryant, *What I Saw in California* (1849), 414.

[2] Bancroft, v, 434.

[3] *Ibid.*, 433.

[4] Sen. Ex. Doc., 30 C. 1 S., no. 33, pp. 7, 8, 11.

[5] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 295, 308.

Hon. W. P. Hall to inquire whether the reports were true that he was using his talents and high character as a member of Congress to cast doubts upon the legitimacy and validity of the governor's tenure of office.[1]

A few other acts deserve more notice. One of these was the execution of a note by J. C. Fremont, governor of California, binding himself and his successors in office, as the legal representatives of the United States, to pay to Francis Temple the sum of $5,000, as soon as possible after the receipt of the funds from the United States, for a small island, near the mouth of San Francisco Bay, conveyed by the said Temple to the United States.[2] This certainly was a remarkable contract, since it bound the agent to secure for his government property in foreign hostile territory which he, by his own confession, was holding and governing only by right of conquest under the laws of nations.[3]

The question of ways and means engaged the governor's attention early and late. February 3, he addressed Mr. Buchanan, Secretary of State—thus showing a misconception of his position by not addressing the Secretary of War—to say that considerable sums of money would be needed to maintain his government.[4] Four days later his financial embarrassments were laid before Commodore Shubrick, who had just arrived in California, and the favor of a loan was asked, but the commodore did not see fit to grant the request.[5] A few days before this the governor secured from Don A. J. Cos the sum of $2,000, by binding himself, in the name of the United States government, to repay the loan within two months, with interest at three per cent. a month. February 20, another $1,000 was secured on the same terms.[1] March 3, the sum of $2,500 was borrowed of Don Eulojio de Celis "for the benefit of the United States" on a note to which was affixed the seal of the territory.[2]

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 33, pp. 7, 8, 11.

[2] *Ibid.*, 12.

[3] *Ibid.*, 287.

[4] H. Ex. Doc., 31 C. 1 S., no. 17, p. 250.

[5] Sen. Ex. Doc., 30 C. 1 S., no. 33, p. 10.

This same Celis was partner in a cattle deal which had a more or less shady side for Colonel Fremont. On the date last mentioned a contract was made in which Celis agreed to deliver six hundred head of cattle to the commissary of the troops under Fremont's command, for which Fremont bound himself and his successors in office to pay the sum of $6,000, and to deliver to Celis the hides of the cattle.[3] April 26, Fremont gave to Celis a certificate that he had complied with the contract by delivering the specified number of cattle, and also a due bill against the United States for the sum of $6,975, with interest at two per cent. a month at the expiration of eight months after April 18.[4] Yet sufficient proof was afterwards found that Celis never delivered a single one of the cattle to the commissary and that not one of the six hundred was slaughtered for the use of the battalion; but, on the contrary, that they were delivered to a Mr. Stearns, of Los Angeles, in two instalments, May 1 and July 6, subsequent to the discharge of the battalion. Mr. Stearns said that they were delivered to him on a special agreement to breed them on shares for three years, and that he regarded them as the private property of Colonel Fremont.[5] The government does not appear ever to have assumed responsibility for any of the Celis claims. That of Mr. Cos was paid.[6]

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[1] H. Ex. Doc., 30 C. 1 S., no. 17, p. 329.

[2] *Ibid.*, 365.

[3] *Ibid.*, 370.

[4] *Ibid.*, 365, 371.

[5] *Ibid.*, 363 *et seq.*

[6] Bancroft, v, 466 *et seq.*

Still another transaction deserves to be noticed. March 18, Fremont secured $15,000 from Francis Hültman for drafts on the United States by allowing a premium of $4,500. Following suspiciously close upon this transaction came a special order (March 21) to the collector at San Pedro to receive "government payment" (that is, due bills of the California volunteers, bought up at a considerable discount) from Mr. Hültman in payment of customs dues.[1] The draft not being honored, suit was brought against Fremont in London, where judgment was secured for the original $19,500, with interest and costs, amounting to $48,814. By act of March 3, 1854, the government assumed responsibility, but charged the $15,000 to Fremont until he could prove that it had been used for public purposes. The proof does not appear to have been furnished.[2]

In view of these facts, it is not strange that the eulogists of Fremont pass over this part of his career in silence. The impression is left that he was seeking something else than the glory of serving his country. Debts had to be created, both by Stockton and by Fremont, but the best that can be said for the latter is that some of his were marked by "irregularities." The government, as it was in honor bound to do, assumed responsibility for the most of these debts resting on good proof, and passed by the irregularities with a questionable leniency.

III. Fremont Ousted by Kearny

Fremont's whole conduct in regard to the governorship showed such an entire misapprehension of the character of that office and of his own position as to tempt one to believe that it arose from infatuation. Stockton's right as a conqueror to institute a "civil" government cannot be questioned; nor was there any objection to an army officer *voluntarily* acting as governor for him, so long as there was no army officer superior to the one acting as governor to command otherwise. That a supreme commander cannot tolerate in a hostile country a civil establishment independent of his control does not appear to have occurred to either Stockton or Fremont, else why did the former offer to yield the supreme command to Kearny while holding the governorship for Fremont? And why did Fremont, signing himself as lieutenant colonel in the United States army, refuse obedience to a brigadier general of the army who was on the spot? What but infatuation or stupidity could induce an army officer to believe that the command of a naval officer, an inferior in rank at that, could relieve him of his obligations to his superiors? Yet the "legality and validity" of Fremont's tenure was based upon just such conditions.

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 33, p. 16.

[2] Bancroft, v, 466.

It must be confessed that the orders issued by the Navy and War Departments were somewhat contradictory, but they have not been cited in connection with the controversy, except so far as they were received and actually played a part in it. It is now time to notice others, first recalling those already mentioned.

Kearny's instructions of June 3, 1846, to establish a civil government in California, should he conquer it, were, as previously stated, held by Stockton and Fremont to have been superseded by later events, the work directed being already done. The instructions to Sloat of July 12 also directed him to establish a civil government. In the absence of a military officer higher than a captain, he was to have the selection of the first post or posts on the waters of the Pacific.[1] What officer other than Captain Fremont could have been expected to be in California before the arrival of Colonel Stevenson or General Kearny? In a letter of August 13 to the senior naval officer in the Pacific, Mr. Bancroft took care to cite the "General Regulations for the Army" (1825) to the effect that no officer of the army or navy could assume any direct command, independent of consent, over any officer of the other service. He also stated that the President expected the most cordial and effective coöperation between the officers of the two services and would hold any commander to a strict accountability for any failure to preserve such harmony.[1] Four days later a letter of similar tenor was addressed to Commodore Shubrick. He was expressly instructed "to advise with any land officer of high rank (say that of brigadier-general)" who might be at hand in making post regulations.[2] September 11, Secretary Marcy addressed Colonel J. D. Stevenson, about to sail for California with a regiment of New York volunteers: "Where a place is taken by the joint action of the naval and land forces, the naval officer in command, if superior in rank to yourself, will be entitled to make arrangements for the civil government of it while held by the coöperation of both branches of the military force." All his powers were, as a matter of course, to devolve upon General Kearny as soon as he arrived.[3]

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[1] H. Ex. Doc., 29 C. 2 S., no. 19, p. 81.

So far, it will be observed, no orders had gone out from the Navy Department revoking the orders of July 12, yet the later dispatches of Secretary Marcy certainly indicate that the land officer, if outranking the naval commander, was to have charge of civil affairs. It is not customary to supersede the orders of one department by later ones from another, at least without express mention of the fact. Soon afterwards news of the actual conquest and of Stockton's proclamation of July 28 reached Washington, and then explicit instructions were sent out. Under date of November 3, General Scott directed General Kearny to cause the California volunteers to be regularly mustered into service, if this had not already been done. Directions were given regarding the civil government, which simply assumed that he would have charge of it. Two days later Secretary Mason directed Stockton to relinquish civil affairs to Colonel Mason, or to General Kearny, if the latter arrived before he had done so, retaining only the regulation of port duties and the import trade.[1]

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[1] H. Ex. Doc., 29 C. 2 S., no. 19, p. 83.

[2] *Ibid.*, 93.

[3] *Ibid.*, 13.

January 22, 1847, Shubrick arrived at Monterey with the instructions of July 12. He did not approve what had been done in the organization of the civil government, but decided not to interfere until the wishes of the President in regard to the appointment of Fremont were known.[2] When General Kearny arrived (February 8) and they had read each other's instructions, each "was prepared to pay all proper respect to them." Shubrick recognized Kearny as the commanding officer in California,[3] and Kearny in turn offered his assistance to Shubrick in the management of civil affairs, regarding the instructions of July 12 as superseding his own.[4] They then agreed upon their separate duties, and Kearny went to San Francisco to look after the fortifications there. February 12, Colonel Mason arrived at San Francisco with letters and instructions up to November 5. From that day the doom of Fremont was sealed.

[1] H. Ex. Doc., 29 C. 2 S., no. 19, pp. 15, 91.

[2] Sen. Ex. Doc., 30 C. 1 S., no. 33, p. 296.

[3] H. Ex. Doc., 30 C. 2 S., no. 1, p. 1071.

[4] H. Ex. Doc., 31 C. 1 S., no. 17, p. 283.

Kearny now had explicit instructions to assume the management of civil affairs and the requisite force with which to back his claims. He was under no obligations whatever to make known these instructions to Fremont, but, as a matter of courtesy, he ought to have done so. Shubrick, who had superseded Stockton, was under a moral obligation at least to make known his instructions. But nothing of the kind was done, and Fremont was allowed to go on piling up evidence against the day of reckoning upon which Kearny had already determined. March 1, 1847, Shubrick and Kearny issued a joint circular at Monterey reciting that the President had divided their duties as already explained in connection with the instruction, and expressing the hope that a cordial coöperation would produce only happy results. Three days later Kearny issued a proclamation (dated March 1) to the people of California.[1] Neither of these documents made any reference to the government established by Stockton. Any one reading them would have supposed that a government was now for the first time about to be established under the auspices of the United States.

Copies of these papers were sent to Fremont, but with no hint of the new instructions. Two important orders, dated March 1, were also sent. The first required Fremont to muster in the California battalion under the volunteer acts of 1846 in order that they might be properly paid for past services. Such as were unwilling to serve longer he was to convey to San Francisco (Yerba Buena), *via* Monterey, and there discharge them. Lieutenant Gillespie was relieved and Lieutenant Colonel Cooke was ordered to take charge of the southern military district. The other order required Fremont to deliver to Kearny, with as little delay as possible, all the archives and public documents appertaining to the government of California. The last paragraph added that, after complying with these instructions, the colonel would be free to leave the country, in accordance with instructions from General Scott. This order was signed by Kearny as "Brigadier General and Governor of California." March 16, "Governor" Fremont directed his secretary of state to reply that the volunteers refused to a man to be mustered in according to the order. The secretary also said: "The governor considers it unsafe, at this time, when rumor is rife with a threatened insurrection, to discharge the battalion, and will decline doing so." [1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 288.

On the previous day Fremont had taken precautionary measures in an order to Captain Richard Owens, commanding the California battalion at San Gabriel. After reciting that official duties called him to the north, he ordered the captain to make no move whatever with the battalion from San Gabriel during his absence, except to report an actual invasion, and not to obey any order not emanating from himself.[2] A week later he started on his famous ride to Monterey, covering the entire distance there and back to Los Angeles, about eight hundred miles, in eight days.[3] The object of this journey is not definitely known. Fremont afterwards said that it was to give Kearny information of an impending insurrection and to find out whether he would assume the financial obligations incurred by him as governor.[4] Bancroft thinks that this motive was manufactured and that his real purpose was to find out if

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 33, pp. 33, 15.

[2] *Ibid.*, 14.

[3] Bigelow's *Memoir of Fremont*, 152 *et seq.*

[4] Sen. Ex. Doc., 30 C. 1 S., no. 33, pp. 107, 427.

Kearny's recent orders were founded on new instructions from Washington.[1]

We have only Kearny's account of the interview between himself and Fremont. First the latter made some objection to the presence of Colonel Mason in terms which Kearny deemed insulting. Before allowing the conversation to proceed he then asked whether his orders of March 1 would be obeyed. After about an hour's reflection Fremont replied in the affirmative. At this Kearny expressed great satisfaction, and gave certain verbal orders regarding the volunteers, supposing that Fremont would return to Monterey as soon as possible.[2]

The interview occurred March 26. Two days later Kearny sent Colonel Mason to the southern district, clothed with plenary powers, both civil and military, and bearing a letter to Fremont. This letter requested Fremont to see that all unsettled accounts against the government incurred by his order were at once properly authenticated and completed for the action of the disbursing officers, as it might be necessary for him to proceed from Monterey to Washington.[3] What he did about the accounts has already been noticed in connection with his administration.

The conduct of Mason toward Fremont was overbearing and resulted in a challenge. The weapon selected by the former was a double-barrelled shot-gun, but Kearny forbade the duel.[4] Two days before the sending of the challenge Mason requested of Fremont a list of his civil appointments and such of the official records as were in his possession. Fremont replied (April 13) that such records of his official acts as governor as had been preserved had already been sent to Washington and that only two permanent civil appointments had been made.[1] And here we may take leave of the colonel as governor of California.

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[1] *California*, v, 442.

[2] Sen. Ex. Doc., 30 C. 1 S., no. 33, pp. 104 *et seq.*

[3] *Ibid.*, 34.

[4] Bigelow's *Memoirs*, 203 *et seq.*

The foregoing narrative shows that Fremont was not relieved of the governorship; he was treated as a usurper and ousted accordingly. Fremont tells us that he knew nothing of the instructions of November 5 at the interview with Kearny, March 26. Supposing that he was to be deposed by violence, he submitted, so he says, in order to prevent a struggle and the injurious results to the public service that would follow such a contest.[2] This certainly is strange language for an inferior officer to use respecting the act of a superior. Yet so far had the colonel's infatuation gone that he actually thought that his position as governor made him, a lieutenant colonel, commander-in-chief, even when a brigadier general was in the country![3] He was now sent east under duress, was tried by court-martial, found guilty of mutiny, of disobedience to orders, and of conduct prejudicial to good order and military discipline, and sentenced to dismissal from the service. But in consideration of the circumstances of the case, the sentence of dismissal was, upon the recommendation of the court, remitted by President Polk.[4] The fact that he was a son-in-law of Senator Benton probably accounts in part for the lenient treatment he received. Fremont then resigned.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 308.

[2] Sen. Ex. Doc., 30 C. 1 S., no. 33, pp. 422 *et seq.*

[3] *Ibid.*, 427.

[4] *Ibid.*, 340 *et seq.*

CHAPTER V

THE FINAL REORGANIZATION

I. SETTING UP THE "CIVIL" GOVERNMENT

IN spite of the fact that Kearny had received General Scott's letter of November 3, disapproving of the annexation of New Mexico, he does not appear yet to have had a clear conception of the status of the conquered country. His proclamation of March 1 was more conciliatory in tone toward the Californians than the ones previously issued by Stockton, but it went practically as far as the latter's of the previous August in annexing the country, though without using the word annexation. A part of it may be quoted:

> It is the wish and design of the United States to provide for California, with the least possible delay, a free government similar to those in her other Territories; and the people will soon be called upon to exercise their rights as freemen, in electing their own representatives to make such laws as may be deemed best for their interest and welfare. But until this can be done, the laws now in existence, not in conflict with the constitution of the United States, will be continued until changed by competent authority; and those persons who hold office will continue in the same for the present, provided they will swear to support that constitution, and to faithfully perform their duty.
>
> The undersigned hereby absolves all the inhabitants of California from any further allegiance to the republic of Mexico, and will consider them as citizens of the United States. Those who remain quiet and peaceable will be respected in

their rights, and protected accordingly. Should any take up arms against or oppose the government of this territory, or instigate others to do so, they will be considered as enemies, and treated accordingly.

The governor then congratulates the Californians on their release from Mexico, the source of their domestic troubles, and predicts that they, united with the Americans as a band of brothers under the folds of the star-spangled banner, will soon be the possessors of happy and prosperous homes.[1]

While ignoring the acts of Stockton and Fremont, Kearny really acquiesced in their work by allowing the office-holders, including their appointees, to continue in the discharge of their duties. "The laws now in existence" were not understood to include those providing for a legislative council, for on the day the proclamation was published Kearny replied to communications from San Francisco and Sonoma, where councillors had been chosen by the people, that he had not called any such council and did not contemplate doing so.[2] A few changes in the offices of alcalde and collector were rendered necessary by the withdrawal of the naval officers in charge of them. Thereafter the government simply grew as it was forced, very much against its will, to expand in an effort to meet the needs of a rapidly increasing and very heterogeneous population. The changes will be noticed in their proper place.

General Kearny[3] served as governor until May 31, 1847,

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 288 *et seq.* [2] *Ibid.*, 290.

[3] Stephen Watts Kearny was born in Newark, New Jersey, August 30, 1794. He was a student at Columbia College, but at the outbreak of the War of 1812 he enlisted as a lieutenant and served with distinction. Thereafter his service in the regular army appears to have been continuous. He died in St. Louis, October 31, 1848.

Richard Barnes Mason (1797-1850) was a descendant of George when he left for the United States, and was succeeded by Colonel R. B. Mason, the senior military officer in California. Mason served until April 13, 1849, when he in turn was succeeded by Brigadier General B. Riley, who served until the state government went into operation. A part of the time H. W. Halleck, then a lieutenant of engineers, afterwards famous in our military history, and the author of a standard work on international law, served as "secretary of state."

II. The Regulation of Foreign Trade

In the course of the war with Mexico the commercial policy of the United States toward her enemy underwent a complete change. In the instructions of June 3, 1846, General Kearny was directed to abolish all arbitrary restrictions in the customs laws of such territory as he should conquer and impose light duties, the object being to conciliate and win the people rather than to raise a revenue. Whether supplies should be secured by requisition or by purchase was left to the discretion of the commanding officer. Later instructions of this year directed that ships and cargoes from the United States should be allowed to come and go free of duty; those of neutrals were to pay no higher rates than those collected in the United States. The collections were to be made by civil officers, subject to the same rules as other civil officials in the country.[1]

Mason, the first of the Virginian family of that name to settle in America. He entered the army in 1817 as a second lieutenant.

Bennet Riley was born at Alexandria, Virginia, in 1787. He entered the army as ensign of rifles, January 1, 1813, from which time his service appears to have been continuous.—Appleton's *Cyclopedia of American Biography.*

[1] Instructions from the Secretary of the Navy, July 12, August 13, 17, and November 5, 1846. H. Ex. Doc., 29 C. 2 S., no. 19, pp. 82 *et seq.*, 91, 92.

But when this policy failed to produce the desired effect —to win the people of Mexico by being kinder to them than their own government, and thus bring about a speedy termination of the war—President Polk determined to shift the burden of the war upon the Mexicans themselves, so far as possible, and asked the Secretary of the Treasury, Mr. R. J. Walker, to examine the Mexican tariff laws and report such a schedule of duties as would be likely to produce the greatest amount of revenue. March 30, 1847, Secretary Walker replied with a tariff schedule and a series of regulations. The Mexican ports were to be thrown open to the commerce of the world, except that the coastwise trade was confined to American vessels, and Mexican vessels were excluded entirely. American goods, except government supplies, were to pay duty the same as those of any other nation. Goods shipped from one Mexican port to another were subject to duty for every reshipment. Many articles of American manufacture prohibited by the Mexican tariff were now subjected to a revenue duty. A tonnage duty of one dollar per ton was levied in lieu of port duties and charges. The collection was entrusted to the military and naval officers, who were to account therefor to the Secretaries of War and of the Navy. In his letter to Secretary Walker, President Polk had said that it was the right of a conqueror to establish temporary military governments and to exact such contributions. He now asked the Secretaries of War and of the Navy to carry the recommendations into effect, and orders were issued accordingly April 3. May 10, Secretary Marcy sent a copy of the regulations to General Kearny and asked him to see that they were enforced on the Pacific coast. This letter contained a ruling by the President the justice of which is at least open to question. It was to the effect that a previous payment to Mexico would not exempt a vessel or cargo from the operation of the above regulation. However, no complaint appears to have arisen in California on this score.[1] Other modifications were made later, but only one needs to be noticed here. This was an order of October 13, 1847, which practically opened the coast trade in California to foreign vessels, since they were now required to pay duties at any one port only on so much of their cargo as was landed there. Instruction was also given to General Kearny to apply the money so collected to meet the expenses of the war and to support the temporary civil government.[2]

But the making out of orders in Washington was one thing and the enforcement of them in California was another. Communication between the two places was slow, about three months being the time usually required for the transmission of a letter from the one to the other; besides many contingencies arose in California which could not be foreseen in Washington. The minute regulations outlined above were not received in California until October, 1847. Meanwhile the officials there had already made several trade and revenue regulations, in pursuance of the rights of belligerents as they conceived them and of the broad instructions given in 1846.

The duties imposed by Commodore Stockton have already been noticed. Even these moderate charges were subsequently modified by Shubrick and Biddle. When General Kearny heard of Fremont's permission for the discharge of custom-house dues in "government payment" he promptly issued orders that nothing should be received by the collectors except specie, treasury notes, or drafts.[3] June 1,

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[1] Sen. Ex. Doc., 30 C. 1 S., no. 1, pp. 552 *et seq.*; Mayo, *Treasury Instructions*, i, 412 *et seq.*

[2] H. Ex. Doc., 31 C. 1 S., no. 17, p. 250. [3] *Ibid.*, 300 *et seq.*, 385.

Colonel Mason ordered the custom-house receipts to be set apart as a civil fund subject only to the order of the governor for the expenses of the civil department in California.[1]

When the War and Navy Department orders of April 3 were received, Colonel Mason at once (October 4) dismissed the civil collectors and directed the military officers to take charge. But he did not follow the schedule sent from Washington. On the other hand, he informed the collectors that "the present authorities in California deemed it most to the interest of the United States not to enforce that schedule," and directed them to collect the duties imposed by Commodore Shubrick, September 15, 1847.[2] The tonnage duty was raised from ten to fifteen cents, though the orders from Washington required one dollar. Specific duties had been adopted in all cases in Mexico. One reason for this was the difficulty of securing equitable appraisements. The *ad valorem* method already adopted in California was not altered, at least in some cases. Still other modifications of the orders of April 3 were made from time to time. Several foreign-built vessels owned by citizens of the United States or of California were licensed to engage in the regular coasting trade. This trade was duty free so far as confined to native products.[3] The granting of one privilege led to the demand for another until Colonel Mason finally declared that he could make no more modifications of the President's regulations in favor of the people of California until he heard from Washington.[4] Later, however, a letter from Shubrick, and a re-reading of the tariff regulations as amended by Secretary Walker, May 10, and by Secretary Marcy, October 13, convinced him that the coasting trade was open to all vessels, and such was declared to be the case.[1] Instructions were received from Washington imposing an export duty on gold and silver, and were duly promulgated. July 26, 1848, Colonel Mason, in the absence of the naval commander, issued twenty-one custom-house regulations, concerned mainly with defining offences and providing penalties. The regulations against smuggling out gold and silver in particular were very severe. No other orders of any consequence appear to have been issued prior to the reception of the announcement of the treaty of peace.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 317 *et seq.*

[2] *Ibid.*, 406. The writer has not been able to find Shubrick's instructions of September 15, 1847.

[3] *Ibid.*, 423 *et seq.*

[4] *Ibid.*, 511.

Colonel Mason very ably defended his course in making these variations. "Promises and assurances, based upon these instructions [June 3, 1846] have gone forth to the people of California as a solemn pledge on the part of the government. It was believed, and received by the people generally as a pledge; but some of our enemies among them have asserted that these promises were made by us to delude them into subordination, after which the same high duties and restrictions on commerce would be restored. Now these persons pass for prophets, because, after nearly a year of quiet and tranquility, high duties are again ordered to be laid, with restrictions upon the coast trade, that will in a great measure prevent the expected competition and reduction of prices; this, too, with the avowed declaration on the part of our government to treat the Californians as open enemies, subject to military contribution." Such a course, he declared, would be a breach of good faith, and he urgently recommended the withdrawal of these new restrictions.[2] As he was neither commended nor rebuked, it may be assumed that his conduct was tacitly approved.

The policy of the administration in the Mexican contribution fund probably will stand criticism under the laws of war at that time, but would hardly do so to-day. According to the Hague Convention, if the taxes imposed for the benefit of the state are collected, it must be done, so far as possible, in accordance with the rules in existence and the assessment in force. If the occupant levies other taxes, they can only be for military necessities or the administration of the territory. The expenses of administration must be on the same scale as that by which the legitimate government was bound.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 544.

[2] *Ibid.*, 424.

The ratification of the treaty with Mexico, proclaimed May 30, 1848, by which California became a part of the United States, was announced to the Californians by Colonel Mason on August 7. Not a word of advice had come with the news of the treaty, and the colonel was left to act on his own judgment for about six months longer. August 9 he ordered the revenue laws of the United States to be substituted immediately for those under which the military contribution had been levied.[2] A very practical question soon presented itself in the treatment now to be accorded to vessels owned by Californians. The governor decided that he could not register any vessel, but could only forward applications for registry to the authorities at Washington. But in the meantime, to prevent hardships by a stoppage of trade, he would grant to such as he thought entitled to registry sea-letters or license which would enable them to carry the American flag and trade under its protection. The competency of "the existing government of California" to grant such letters was acknowledged to be open to question, but it was thought that they would confer rights of some value.[3] Civil collectors were again appointed, but the military officers were required to supervise their accounts in order to prevent extravagant expenditures.[1]

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[1] Holls, *op. cit.*, 447, 449.

[2] Doc., no. 17, p. 592.

[3] *Ibid.*, 671 *et seq.*

February 24, 1849, the instructions to officers of the customs issued (October 7, 1848) by Secretary Walker were received, and, at the request of the Secretary of War, were made known to the people of California. These instructions said:

> By the treaty with Mexico, California is annexed to this republic, and the constitution of the United States is extended over that territory and is in full force throughout its limits.

It consequently was ordered by Secretary Walker that goods sent to or from California since May 30 should be treated as if in any other part of the United States. Congress had not, he said, brought the territory within the limits of any collection district, nor authorized the appointment of any collectors, and for this reason it might be impossible to collect the revenue accruing there. Nevertheless, should foreign dutiable goods be introduced there and shipped thence to any port or place of the United States, they would be subject to duty, as also to all the penalties prescribed by law when such importation was attempted without the payment of duties.[2]

Such an announcement can hardly have been expected to produce very great respect for our revenue laws. One could easily infer from the last sentence that foreign goods introduced into California and consumed there, instead of being "shipped thence to any port or place of the United States," would not be subject to duty. And such an interpretation was put upon it by some to their sorrow, as we shall see later. Secretary Marcy did not request Colonel Mason to see that the revenue laws were not violated, but only requested him to "make known to the people of California" Secretary Walker's views, in which he stated that the President concurred.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 684.

[2] H. Ex. Doc., 30 C. 2 S., no. 1, p. 45.

But in spite of this halting, don't-know-what-to-do policy of the Administration, Colonel Mason, constantly in consultation with his secretary of state, H. W. Halleck, a man well versed in public law, adopted a policy and held consistently to it. In announcing Secretary Walker's views it was said that a strict interpretation of them would require dutiable goods to be entered elsewhere and then brought to California in American bottoms, but as this would cause inconvenience and expense, the following alternative was offered: "To pay here all duties and fees, and to execute all papers prescribed by the revenue laws of the United States," without which the governor would not allow goods to be landed. An attempt to do otherwise would cause goods and vessel to be seized and sent to the United States court in Oregon.[2] Since this policy was also supported by the naval commander, there was nothing left for the merchants to do but submit, which some of them did only under protest.

March 3, 1849, Congress made San Francisco a port of entry, but the new collector, Mr. J. C. Collier, did not enter upon his duties until November 13. During all that time the collection of the revenue was in the hands of the military authorities.

For the execution of the trade regulations the commanding officers thought it necessary to establish a court of admiralty. Accordingly General Kearny, March 24, 1847,

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 259.

[2] *Ibid.*, 695.

"in virtue of authority derived from the President of the United States," invested the alcalde of Monterey, the Rev. Walter Colton, with admiralty jurisdiction in and for the territory of California.[1]

III. THE STATUS OF CALIFORNIA BEFORE AND AFTER THE TREATY

We have already seen that the conquered territory did not become a part of the United States, but that it was held by military occupation under the laws of nations. But, in spite of General Scott's letter of November 3, 1846, General Kearny appears to have had no clear conception of the nature of the government he was to establish, for we find him speaking of the Constitution of the United States as though it were in force in California, and requiring an oath of his civil officials to support it. But after the receipt of Secretary Marcy's letter of January 11, 1847, Colonel Mason officially recognized the fact that his government was military, with only such rights as the laws of nations recognize, and from that time we hear no more about the Constitution of the United States until after the treaty of peace.[2]

In consequence of one of General Kearny's decrees there arose a question as to what rights a belligerent may exercise while holding his enemy's territory. The decree referred to was one granting certain lots to the town of San Francisco.[3] In writing his report (March 1, 1849) on the laws relating to public land in California, Secretary Halleck used words which implied that he thought Kearny merely meant to direct the selection of such lots as would be needed for government purposes, surrendering all claim on the part of the United States to the rest, which were to be sold as municipal lands already belonging to the town.[1] On its face, however, the decree was an original grant and it was treated as such in the courts, where it does not appear that any claim was made that the town already owned the lots. Respecting this grant the Supreme Court said:

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 291.

[2] *Ibid.*, 318.

[3] *Infra*, 248.

> Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. Municipal authority also was exercised for a time by subordinate officers appointed by our military commander. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the department. By virtue of that supposed authority,[2] General S. W. Kearny, March 10th, 1847, as military governor of the territory, [made the grant already described.]
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> * * * * * * * *
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> But the power to grant lands or confirm titles was never vested in our military governors; and it follows as a necessary consequence that the grant as originally made was void and of no effect.[3]

The Mexican governor of California appears to have had authority to grant lands, but, whatever his authority in this respect may have been, the Court evidently say that the military governor did not succeed to it. The language of the decision leads one to infer that the Court thought he might have been invested with such power before the treaty of peace, but the attempt to exercise this power by the United States would have violated the laws of war, for no belligerent may assume to dispose of the immovable property of his enemy.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 124.

[2] General Kearny's words were: "I, . . . governor of California, by virtue of the authority vested in me by the President of the United States," *etc.*

[3] Mumford *vs.* Wardwell, 6 Wall., 435.

Soon after the organization of the state government the validity of grants made by the alcaldes appointed by the military occupant was called in question, and such grants were declared void by the supreme court of California.[1] This decision was based on the same principle as that in Mumford *vs.* Wardwell. As many such grants had been made it created consternation and alarm, and was, in the course of a few years, overruled.[2] The new decision, however, shifted to a different basis, and held that the pueblos owned the lands in fee and could dispose of them in time of war as well as in time of peace, just as a natural person could do. Whether the alcaldes were legally elected or appointed made no difference, for they were *de facto* officers, were obeyed as such, and their acts within the powers of their office must be binding.[2] A case finally came before the Supreme Court of the United States, which held that the pueblos did not hold their lands as a private individual did his estate, but that they were *quasi* public domains subject to the disposition of the government of the country, and that the prefect (or alcalde) had no right to alienate them during the continuance of the war, whatever may have been his powers before.[3]

Another decree involving the rights of a military occupant was that establishing the court of admiralty. The competency of such a court to decide upon prize cases was doubted at the time, but the alternative lay between a recognition of its jurisdiction and of the extreme right of the belligerent to burn and sink his captures. As the naval force in the Pacific could not spare prize crews to send captures within the jurisdiction of our regular courts they were disposed of at Monterey. Seven condemnations in all were made by this court,[1] one of which afterwards came before the Supreme Court of the United States. This was the case of "The Admittance," an American vessel which sailed from New Orleans for Honolulu after the declaration of war and was captured while trading with the enemy at San José, California. Respecting her condemnation and sale by Judge Colton as lawful prize the Supreme Court said:

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[1] Woodworth *vs.* Fulton, 1 Cal. Rep., 305 *et seq.*

[2] Cohas *vs.* Raisin, 3 Cal. Rep., 452.

[3] Alexander *vs.* Roulet, 13 Wall., 386 *et seq.*

> All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution and laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.
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> The courts, established or sanctioned in Mexico during the war by the commander of the American forces, were nothing

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[1] Colton, *Three Years in California*, 407 *et seq.*

more than the agents of the military power to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought fit to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.[1]

The law of England is different, for by it the crown may establish prize courts in conquered territory. At least such was the law a century ago and it does not appear to have been changed. However, it appears to have been based upon the old idea that the limits of the empire were extended, *ipso facto*, by conquest, and that the conquered territory instantly became a dominion of the crown, and subject to the old prerogative of the crown to establish courts.[2] While the judicial authority of the United States is vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish, it is hard to see why the establishment of prize courts in foreign territory may not be justified under the war power of the Executive, or the law of necessity, as easily as a great many other things which frequently have been done. Such justification appears all the more reasonable when it is remembered that the courts of the United States have no monopoly of the administration of the laws of nations. And if, as is affirmed elsewhere, the President may establish courts under the laws of nations, why may he not establish courts to administer those laws?

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[1] Jecker *vs.* Montgomery, 13 How., 515.

[2] Halleck, ii, 402.

One hardly knows whether to be the more surprised or confused on finding that the Supreme Court afterwards cited this case as illustrative of the principles applicable to military occupation, and in the next breath, without a word of comment, sustained the exercise of admiralty jurisdiction by the provisional court established in Louisiana by President Lincoln in virtue of his authority as a military commander. The decisions of this court had already been legalized by Congress, but the Court affirmed that it was "rightfully established by the President in the exercise of his constitutional authority during war." [1] This was not a case of prize, but the difference would seem to be in favor of the court at Monterey. If the President cannot establish a court in foreign territory to administer the laws of nations, much less, it would seem, can he establish such a court on domestic territory, even when hostilely occupied, and still less one to administer the laws of the United States.

During the armistice, pending the conclusion of peace, the former Mexican governor of California, Pio Pico, appears to have thought that he was, by the terms of the armistice, which allowed the Mexican civil officials freely to exercise their functions, to be restored to his position as governor. July 22, 1848, he addressed a letter to Governor Mason, "requesting that you will be pleased to expedite your orders to the end that, in the places in California occupied by the forces of the United States of America, no impediment be placed in my way towards the establishment of constitutional order in a political, administrative, and judicial manner." [2] The letter closed with protestations of friendship and good will, but as the return of the ex-governor was creating excitement among the natives, Governor Mason ordered his arrest. He appears to have been confined a week or more and then released.[1]

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[1] *The Grapeshot,* 9 Wall., 133.

[2] H. Ex. Doc., 31 C. 1 S., no. 17, p. 602.

After the conclusion of peace it may very reasonably be assumed that Colonel Mason was almost nonplussed at his anomalous position. He could find no authority for a military officer to exercise civil control in time of peace in a territory of the United States; but, believing that to throw the management of affairs upon the alcaldes, the only civil officials in the country, would lead to endless confusion, he determined to maintain his position and keep order, if possible, with the rapidly diminishing force at his command. He also felt it his duty to attempt the collection of duties according to the United States tariff law of 1846. Regarding this he said:

> I am fully aware that in taking this step, I have no further authority than that the existing government must necessarily continue until some other is organized to take its place. . . . . But the calamities which would surely follow the the absolute withdrawal of even a show of authority, impose on me, in my opinion, the imperative duty to pursue the course I have indicated, until the arrival of despatches from Washington . . . relative to the organization of a regular civil government. In the meantime, however, ... my force is inadequate to compel obedience.[2]

The views of the administration were somewhat tardily set forth by Secretary Buchanan in a letter (October 7) to Mr. W. V. Voorhies on the eve of his departure for California to establish postoffices and post routes. After congratulating the Californians upon the glorious future before them, he expresses the President's regret that Congress did not establish for them a territorial government and hopes that this will soon be done. Continuing he said:

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[1] Bancroft, v, 588 *et seq.*

[2] *Ibid.*, 591 *et seq.*

> In the meantime, the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the treaty of peace, the military government which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. But is there, for this reason, no government in California? Are life, liberty and property under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government, a government *de facto,* in full operation; and this will continue, with the presumed consent of the people until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.
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> This government *de facto* will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land.
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> * * * * * * * *
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> But, above all, the constitution of the United States, the safeguard of all our civil rights, was extended over California on the 30th of May, 1848, the day on which our late treaty with Mexico was finally consummated. From that day its inhabitants became entitled to all the blessings and benefits

> resulting from the best form of civil government ever established amongst men.[1]

Yet all this contained no very definite statement as to the character of this *de facto* government and the extent of its powers. Subsequent instructions sent out by the next administration (Taylor's) "presumed that a *de facto* government remained . . . . on the consent of the inhabitants . . . . to protect persons and property." Only the laws in force in California at the time of the conquest were thought to be still operative. Of course no regulations in opposition to the Constitution and laws of the United States could be enforced by the *de facto* government. With this limitation the government was to be aided and respected in the exercise of its functions by the commanding officer.[2]

When General Riley heard of the failure of Congress to provide any government for California he issued a proclamation (June 3, 1849), in which he said:

> In the absence of a properly appointed civil governor, the commanding officer is, by the laws of California, *ex officio* civil governor of the country; and the instructions from Washington were based on the provisions of these laws. This subject has been misrepresented or at least misconceived, and currency given to the impression that the government of the country is still *military*. Such is not the fact. The military government ended with the war, and what remains is the *civil* government, recognized in the existing laws of California. Although the command of the troops in this department and the administration of civil affairs in California are, by the existing laws of the country and the instructions of the President of the United States, temporarily lodged in the hands

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[1] Doc., no. 17, pp. 6 *et seq.*

[2] Secretary Crawford to Brigadier-General Riley, April 3 and June 26, 1849. Doc., no. 17, pp. 273, 276.

of the same individual, they are separate and distinct. . . . . The instruction of the Secretary of War made it the duty of all military officers to recognize the existing civil government, and to aid its officers with the military force under their control. Beyond this any interference is not only uncalled for, but strictly forbidden.[1]

The foregoing quotations show that the authorities both in Washington and California believed that at the conclusion of the war the military government became merged into a sort of *de facto* civil government subject to the laws of California at the time of the conquest and of the Constitution and laws of the United States. After the treaty the most important civil business in California—the phraseology is designedly chosen so as not to say *whose* business it was—was the regulation of foreign trade. In regard to this General Persifor F. Smith, for a while senior officer in California, but never acting as civil governor, instructed Colonel Mason (March 15, 1849) that no duties could be exacted of any vessel or on any goods, but that if merchants so preferred, they might deposit the amount of the duties subject to the disposition of Congress and then land their wares.[2] No one appears to have made any claim that the *de facto* government in California had any legal right to collect duties, though General Riley appears to have come very near it in his claim, hardly well founded, that the "civil fund," which grew out of this source of revenue, had been collected and disbursed by the "governor of California" and could be expended only on his orders. He also held that not a cent of this fund had been collected under the authority of any department of the army.[3] Whatever their rights in the matter, the successive heads of the civil government did assume that it was their duty to prevent the violation of the United States revenue laws by the landing of goods without the payment of duty. This assumption probably grew out of the fact that the collection of the military contribution was by the President entrusted to the so-called "civil" government. A circular of May 3, 1849, sent out to the various collectors by Halleck as "secretary of state," referred to the original division of duties between the military and naval officers by the President's orders as though those orders were still in force.[1] Yet no claim was ever made to the right to collect revenues, either in virtue of these orders, which did originally impose this as a duty, or of any law. When paid voluntarily they were passed to the credit of the civil fund, subject to orders from Washington.

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[1] Doc., no. 17, p. 776 *et seq.* [2] *Ibid.*, 713. [3] *Infra*, 233 *et seq.*

The somewhat confused reasoning of the Supreme Court in the celebrated case of Cross *vs.* Harrison does not help us much in the search for a legal basis for the collection of this revenue. This case may be briefly stated as follows:

Cross *et al.* wished to land goods at San Francisco without the payment of any duties. When Mr. Harrison, one of the collectors appointed by Governor Mason after the treaty of peace, refused to allow this they paid the duties under protest and brought suit to recover them. They contended: 1. That from February 3, 1848, the date of the treaty with Mexico, until March 3, 1849, when, by act of Congress, California was erected into a collection district, no duties on foreign goods could accrue to the United States in California. 2. That from March 3 to November 13, 1849, when the collector entered office under the act of Congress, the exaction of duties by Mr. Harrison was illegal, he not being a legally appointed collector.[2]

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[1] Doc., *ibid.*, 757.

[2] Cross *v.* Harrison, 16 How., 164 *et seq.*

The Court held that duties under the war tariff were legally exacted until August, 1848, when news was received of the ratification of the treaty. For, said the court,

> Up to that time . . . . duties had been collected under the war tariff, strictly in conformity with instructions which had been received from Washington.
>
> It certainly will not be denied that those instructions were binding upon those who administered the civil government in California, until they had notice from their own government that a peace had been finally concluded.

But further on it is affirmed that

> By the ratification of the Treaty, California became a part of the United States. And as there was nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage.

Subsequently a qualification is added to this, with no apparent idea, however, that it was needed to harmonize the two preceding irreconcilable rulings, and it is affirmed that

> The territory became subject to the Acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right.

The next question related to the time at which the war tariff ceased to be legally binding. This the Court found to be August 9, 1848, when the collector at San Francisco was informed by Secretary Halleck that the revenue laws of the United States would be substituted for the war tariff.

If authority to make this change be sought, the Court think it is to be found in the civil government of California, which did not become defunct with the treaty of peace. This government, we are told, was instituted by command of the President, and was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, until Congress should legislate for it. Now, since California was still held and governed as a conquest, the right inference is that the substitution of the United States revenue laws was made in virtue of the war power, and not because California became "bound and privileged" by these laws. That President Polk, through his "civil" government in California, might have continued the war tariff is the conclusion to which this part of the reasoning leads, especially when attention is called to the fact that he gave no intimation that a change was to be made until several months after sending notification of the treaty. In any event, it was his right or duty to make the change.

In regard to the civil government, the Court affirmed that it was bound by the municipal laws and usages in force before the country was ceded to the United States. But in the matter of commerce,

> Foreign trade had been changed in virtue of a belligerent right before the territory was ceded as a conquest, and after that had been done by the Treaty of Peace, the inhabitants were not remitted to those regulations of trade under which it was carried on whilst they were under Mexican rule; because they had passed from that sovereignty to another, whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed. We have said in a previous part of this opinion that . . that sovereignty is . . Congress.

To harmonize this statement with the preceding reasoning of the Court is left to the ingenuity of the reader.

Following the reasoning of the Court, we affirm that if the government of California was civil, the President had no more right to call upon Governor Mason to enforce the United States revenue laws as such than he had to call upon the governor of New York or Oregon. Even if the government of California had been charged with the collection of the revenue under Mexican rule, that law would have become a nullity by the treaty of cession, for that duty in the United States belongs only to those upon whom it has been imposed by our legislature. That the President could require the "civil" government to enforce the war tariff during the continuance of the war nobody will deny. But if, as the Court affirmed in one place, the treaty carried our revenue laws to California, to call upon it to enforce any other would have been to violate his oath to see that the laws are faithfully executed. On the other hand, to call upon Colonel Mason, not Governor Mason, to see that the revenue laws of the United States were not violated, would only have been to observe this oath.

Rejecting the confused reasoning of the Court, but accepting its conclusion that Colonel Mason acted rightly, we may confidently conclude that the "civil" government of California had no legal right to collect the customs revenues after the treaty, either for itself or for the United States, for our revenue laws were binding there as soon as the country was finally ceded. Only a few weeks before announcing the change Colonel Mason had occasion to call attention to the fact that statutes are binding from the date of their passage, when no other time is fixed, though their retroactive effects in remote districts might sometimes be harsh. Treaties do not seem to be any exception to this rule, though Halleck cites the action of the court in approving the collection of duties under the war tariff until August 9 as evidence that our revenue laws do not, *ex proprio vigore,* extend over new territory from the date of the treaty making the cession.[1] Since then, however, the Supreme Court has held that our general laws do take effect in new territory from the date of the treaty.[2] This being true, no duties could be legally collected by anybody in California between May 30, 1848, and March 3, 1849, and all goods landed there were liable to confiscation. But instead of following the strict letter of the law the authorities very wisely allowed goods to be landed, upon the deposit of the amount due on them, an act which could only be legalized by a subsequent law of Congress. The appropriation of the funds so collected to the "civil" government of California could only be legalized in the same way.

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[1] *International Law*, ii, 490 *et seq.*

[2] Dooley *vs.* U. S., 182 U. S., 232.

CHAPTER VI

THE MILITARY RULE IN CALIFORNIA

I. ADMINISTRATION OF THE CUSTOMS AND THE CIVIL FUND

AT first the customs department was administered on the theory that it was a part of a civil government, and for that reason civilians were appointed to act as collectors. Those appointed by Stockton and Fremont were confirmed in office by General Kearny when he assumed the office of governor. Nearly a year after the first appointments were made Governor Mason directed certain officers to settle and audit the accounts of these collectors.[1] Shortly after this orders were received from Washington which made it clear that the army officers should serve as collectors, a change which caused some grumbling. The only consolation Governor Mason could give Captain Folsom was, "I am in for it here, as well as yourself at San Francisco."[2] After the treaty of peace civilians were again appointed, no doubt on the supposition that the government had again become civil.

The pay of these officers was $1,000 to $1,200 per annum, in one case conditioned upon the receipts amounting to that much.[3] After the outbreak of the gold fever it was hard to secure competent men, especially at such salaries. One man refused to serve at San Francisco for less than $3,000, with full authority to "appoint and pay such deputy collector, clerks, appraisers, inspectors, weighers, and gaugers as may be necessary to conduct the business of the customhouse." Mr. Edward Harrison, whom we have already met in the Cross *vs.* Harrison case, was more modest in his demands and received the appointment, September 3, 1848.[1] The next year several lieutenants of the regular revenue service resigned in despair of being able to live upon their salaries.[2]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 385.

[2] *Ibid.*, 404.

[3] *Ibid.*, 298, 305.

The complaints about shortages in accounts or irregularities in making out accounts were very numerous and indicate that the collectors were either dishonest, ignorant, or careless, probably the last two. Fremont's appointees gave trouble in this respect, but their irregularities must have been due to inexperience, for Colonel Mason spoke well of them in his report to Washington when they were thrown out of office by the change already mentioned, and promised to reinstate them, should another change make it possible. One was reappointed after the close of the war and appears to have served with satisfaction.[3] The other showed his zeal for his new flag by collecting $395.25 from a Chilian brig which had put in at Santa Barbara under stress of weather and reporting the same to Colonel Mason, though he was not then a collector. But the conduct of Mr. William Richardson, collector at San Francisco during the first year of the American occupation, was not so satisfactory, his delinquencies amounting to several thousand dollars. The way in which this case was dealt with indicates that there must have been still some confusion in Colonel Mason's mind as to his own position and rights. November 8, 1847, he instructed the auditor at San Francisco,

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 660 *et seq.*

[2] *Ibid.*, 58 *et seq.*

[3] *Ibid.*, 410, 654, 679.

Captain Folsom, to secure all the evidence possible against the collector as a preliminary to putting his bonds in suit when the "proper courts" were established.[1] Just why a military occupant should await the establishment of "proper courts," probably meaning civil courts under the authority of the United States, does not appear. Several peremptory demands for a settlement were made upon Mr. Richardson, but without much effect. Finally, nearly two years after dismissal from office, he offered to pay $5,000 of the amount still due in Peruvian money, and Governor Riley authorized Captain Folsom to receive that sum.[2]

And yet he was described nearly a year before this offer was made, while efforts were in progress to obtain a settlement from him, as a man who had "always been most friendly disposed towards the American government." This was given by Colonel Mason as a reason for complying with Captain Folsom's request to admit free of duty a box of liquors and a piece of silk sent by the admiral of the French squadron as a present to Mr. Richardson and family.[3]

But civilians were not the only collectors who gave cause for complaint. The army officer designated to relieve the civilian at San Diego in 1847 was described by Colonel Stevenson, commanding at Los Angeles, as "perfectly ignorant of mercantile matters and scarcely able to write his name."[4] No report was ever received from him until the command was changed, some eight months later, and then only upon a special order. The accounts of Lieutenant Carnes, at Santa Barbara, were sent back to him as incorrect. After repeated calls for their return, Colonel Mason finally had to threaten him with arrest.[5] Later still other irregularities were found. The colonel's greatest trouble seems to

[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 417.

[2] *Ibid.*, 567, 669, 781.

[3] *Ibid.*, 664.

[4] *Ibid.*, 426.

[5] *Ibid.*, 570.

have been to induce his subordinates to follow the ordinary principles of careful and exact business, particularly the sending of receipts for disbursements. He seems to have been watchful even in the smallest details, such as disallowing an account of $5.00 for blanks.

Yet some of the irregularities were of a serious nature. It was found that Captain Folsom had retained $9,789.72 from the civil fund, for which he had rendered no account. This the treasurer was ordered by General Riley to charge to the captain's account on his books.[1] Numerous complaints were made of unauthorized transfers of sums from one department to another. But Colonel Mason himself sometimes found it necessary to borrow from the "civil fund." In fact, he left California with something over two thousand dollars charged to his account.

Since attempts at frauds on the revenue and smuggling are more or less common in older societies, it would have been unreasonable to expect anything else in a country where society was so unsettled as in California. In November, 1847, Colonel Mason reported that there had been a great deal of smuggling and that it probably would continue, as the numerous bays and coves gave every facility for the landing of merchandise. The difficulty of preventing this was enhanced by the fact that there were no military posts near several places where it had been customary to land goods. One or two good revenue cutters would, he thought, render effective aid. As a reward to informers, he and Commodore Shubrick had offered them one-half of all smuggled goods seized upon their information.[2] When an army officer presented a claim under this rule the colonel first disallowed it on the ground that he had been detailed to look after the collection of the customs. Later, however, on finding that revenue officers of the United States were entitled to a share of the condemned goods, he reversed his ruling, subject to the approval of the War Department.[1] In case of seizure, confirmation by the commanding officer before sale was not deemed necessary.[2] Sometimes goods landed without a permit were restored when it was clear that there was no intention to smuggle. But in general Colonel Mason was not disposed to let off offenders caught violating regulations, even when they offered to pay after landing without a permit, as the regulations had been published and such leniency would establish a bad precedent.[3] Indirect means of smuggling were sometimes resorted to, such as carrying several different sets of papers.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 857.

[2] *Ibid.*, 399.

The allowing of soldiers to buy for their own use goods which had not paid the duty opened another source of fraud. December 24, 1847, Colonel Mason had to instruct Lieutenant Carnes, at Santa Barbara, to look more sharply after the enforcement of the rules. One soldier, he thought, could not possibly want $400 worth of comestibles. A few months later he ordered the lieutenant to collect duties on two barrels of rum, valued at $1,240.46, which a private had bought "for his individual use and consumption." When twenty men clubbed together and bought $505 worth of merchandise, one item of which was two hundred and forty caps, "for their own individual use," he ordered the collector at San Diego to exact duties on $201, and not to tolerate such clubs in the future.[4] In some cases the collectors excused themselves by saying that they had been instructed to "let the soldiers have what they want."

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 411, 453, 497.

[2] *Ibid.*, 449.

[3] *Ibid.*, 458, 679.

[4] *Ibid.*, 449, 489, 496.

After the close of the war there was a rapid increase in business, especially after the discovery of gold, in consequence of which the prevention of frauds became more difficult. August 14, 1848, Captain Folsom gave a gloomy account of the prospect before him at San Francisco: "Acts of disgraceful violence occur almost daily on board the shipping and we have no power to preserve order. To-morrow morning the volunteers will be mustered out of service, and we shall be utterly without resource for the protection of public property. . . . If it is possible to send a vessel of war here, it should be done at once. . . . This is now a United States port, and we are bound by our treaties to protect the commerce in it. . . . This we cannot do at present, and our utterly powerless condition and the lawless transactions in this port and neighborhood are a constant theme of reproach to our flag." [1]

When Mr. James Collier, the first United States collector, arrived in San Francisco he expressed himself (November 13, 1849) as astonished at the amount of business in his office. The city was reported to contain thirty thousand people and to equal Philadelphia in its commerce. Owing to the lack of warehouses, nineteen vessels were employed for the stowing of goods, a practice which opened a wide door for smuggling. After San Francisco, San Pedro, a town of three buildings, was next in commercial importance, being the chief entrepôt for smugglers. An additional cutter would be needed to stop this. As the town was twenty-five miles from Los Angeles, Mr. Collier recommended that it be made a port of entry and given a deputy collector.[2]

Certain vessels built in California, both before and after the American occupation and before the treaty of peace, were licensed by the military authorities to engage in the coast trade. After the close of the war licenses were continued to these vessels, some of which had been bought by Americans. This was done because the American-built vessels were not sufficient to meet the needs of the country, and Commodore Jones recommended to Mr. Collier the continuance of the practice. Some claimed that the vessels were naturalized by the treaty, but the collector held that they were still foreign, since California was foreign territory until the ratification of the treaty, in which there was no mention of the vessels, and that they could be naturalized only by Congress. As for continuing the licenses, he had no discretionary power and could only enforce the law. He regretted that some of his countrymen might be injured by a rise in freight rates and the price of provisions, but the American ship-builders and ship-owners would receive the protection which the law intended to give them.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 613.

[2] *Ibid.*, 26.

A little more than a year after Colonel Mason made his gloomy report, General Riley presented (September 30, 1849) quite a different picture: "No difficulty has been experienced in enforcing the tariff of 1846, and the revenue has been collected at a very moderate expense, considering the peculiar circumstances of the times."[2]

Several references have been made to the "civil fund." A good account of this fund was given by General Riley, then acting governor of California, in two letters dated August 30, 1849, in which he combatted certain pretensions of General Persifor F. Smith, then the ranking officer on the Pacific coast. "In the instructions issued from Washington," said he, "to General Kearny in 1846 . . . it was directed that the duties at the custom-houses should be used for the support of the necessary officers of the civil government. The 'civil fund' was commenced in the early part of 1847, and has been formed and used in the manner directed. The collectors have been appointed by the governor and have been subject to his orders alone. . . . The authorities at Washington were informed of what was being done and no objection was ever raised by them or by Congress. . . . On assuming command in this country as civil governor, I was directed to take Governor Mason's instructions and communications for my guidance in the administration of civil affairs. I determined to continue the collection of the revenue and to add the proceeds to the 'civil fund,' . . . as it formed my only means of defraying the expenses of the government. The expenses are daily increasing, and, as I have no power to impose taxes in this country, I cannot carry on the government without this 'civil fund.' . . . Not a cent of it has been collected under the authority of any department of the army; nor can any officer of the army, simply in virtue of his military commission, have any control, direct or indirect, over it. . . . It has been collected and disbursed by the 'governor of California,' and can be expended only on his orders. . . . I am both surprised and mortified to learn that, at this late hour, an attempt is to be made to remove this money from my control, and to place it at the disposition of officers who have had no responsibility in its collection and who of right can exercise no authority over it. . . . If I mistake not, the opinion that the governor of California has no control over the 'civil fund' is of recent origin. If, however, it now be General Smith's wish to assume a military control of the collection of duties on imports into California, I will immediately discharge the collectors appointed by the governors of California and surrender the entire direction of the matter to such military officers as he may direct. But for the money *already collected* by the civil officers under my authority I alone am responsible; and until further instructions from Washington, I shall continue to hold it subject to my orders only, and to expend, as heretofore, such portions of it as may be required for the support of the existing civil government." [1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 29 *et seq.*

[2] *Ibid.*, 751.

The "civil fund" received increments from a few sources other than the customs revenue, such as the sale of condemned ordnance stores at Los Angeles, presumably the property of California or Mexico, the sale of certain mission property at San Diego, and the rents arising from the leases of the mission estates.[2] Those who had charge of it were directed to keep it separate and distinct from all other funds. Occasional neglect to do this, or transfers of sums from one fund to another without authority, brought forth the governor's rebuke.

Owing to the fact that the army and navy in California were not always well supplied with funds, loans were sometimes made to them from the civil fund. The largest appears to have been one of $70,000 to the navy to pay the expenses of bringing emigrants from Lower California. In addition to these loans individuals borrowed sums ranging from $100 by S. E. Woodworth to $2,500 by Colonel Mason.[3] May 10, 1849, General Canby, assistant adjutant-general, ordered the immediate refunding of all sums which had been transferred to the pay, quartermaster's, and subsistence departments.[4]

The civil government of California was a success from the beginning so far as concerned the amassing of a surplus. The collections during the continuance of the war amounted to $75,566.01. The expense of collecting this amounted to only $3,342.52, leaving a net revenue of $72,223.49. This included $3,259.62 collected at ~~La Paz~~, in Lower California.[1] After the conclusion of peace the receipts rose by rapid strides. Before the close of the military régime the so-called civil government was able to lend the army and navy sums amounting to $978,736.67.[2] The total collection amounted to about $1,500,000.[3]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 791 *et seq.*, 815 *et seq.*

[2] *Ibid.*, 628, 796, 818.

[3] *Ibid.*, 813.

[4] *Ibid.*, 907.

Governors Mason and Riley both appear to have endeavored to be economical and careful in their expenditures. Up to the proclamation of peace the disbursements for the "civil" government, as reported, amounted to only $7,088.51. However, the total must have exceeded this sum, as the accounts cover only a part of the year 1847.[2] This did not include the salaries of collectors, which were included in the expense of collection. Army officers serving in a civil capacity received no extra pay. However, a subsequent act of Congress (March 3, 1849) provided that they might receive extra compensation, the amount to be determined by the President. Officials such as Indian agents, secretaries, clerks, interpreters, judges, and jurors were the chief cause of expense. Extravagance on the part of courts in particular was guarded against, exorbitant fees being disallowed.[4] In a few cases Governor Mason was called upon to pay the expenses of some "irregular" tribunals, but he declared that he could pay no expenses incurred in trials not strictly legal.[5] He also practiced retrenchment in the matter of pensions, declaring (June 4, 1847) that the funds in the custom-house at Monterey belonged to the United States and could not be paid out in the way of pension to anybody until his name had been placed on the pension list by act of Congress.[1] In the latter part of the military régime small sums were expended in various parts of the territory to construct jails, the lack of which had caused no little inconvenience.[2] The largest single item of expense was the constitutional convention which met in 1849. The members of this were liberally paid by General Riley—sixteen dollars per day and sixteen dollars for every twenty miles of travel to and fro—after which the rest of the "civil fund" was turned into the treasury of the United States.[3]

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[1] H. Ex. Doc., 30 C. 2 S., no. 47, p.13.

[2] H. Ex. Doc., 31 C. 1 S., no. 72, pp. 13, 75 *et seq.*

[3] H. Ex. Doc., 31 C. 1 S., no. 59, p. 3.

[4] H. Ex. Doc., 31 C. 1 S., no. 17, p. 419.

[5] *Ibid.*, 489, 691.

II. INTERNAL ADMINISTRATION

As already noticed, it was announced, both at the time of the conquest and after the conclusion of peace, that the existing laws and institutions, so far as not inconsistent with the Constitution and laws of the United States, would continue in force. Such a limitation was hardly within the competency of the conqueror even then—he might have said the constitution and laws of Great Britain, or of Germany, as well—and to-day, as we have already seen, it is not allowable. July 27, 1847, General Scott's General Orders No. 20, which directed that all cases of certain enumerated crimes to which a soldier was a party, either as plaintiff or as defendant against another soldier, or a citizen of the country occupied, should be tried by court-martial or by military commissions, was proclaimed in California. But just what the local laws were was hard to determine, for not a copy could be found in print. To obviate this difficulty Governor Mason prepared a code and sent it to the press, but failed to get it out before the treaty of peace, owing to the fact that the printers had left their shops to search for gold.[1] May 11, 1849, he announced that, in the absence of both law and precedent, the laws and usages of the states and territories in like cases should be consulted for guidance.[2] When it was learned that Congress had failed to legislate for California the code was again taken up and was published, but not in time to be of much service, as the state government soon went into operation.[3] Orders and decrees were issued from time to time as the exigencies of the case demanded, and these had all the force of law. Among them were the orders forbidding the sale of liquor to Indians and announcing the creation of offices unknown to the Mexican laws; the abolition of the Mexican law concerning the denouncement of mines, the practical abolition of the privileges of the clergy by declaring them amenable to the civil courts, and the introduction of trial by jury; and the defining of the right of suffrage.[4]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 320.

[2] *Ibid.*, 754, 790.

[3] *Ibid.*, 850; Bancroft, *Hist. Cal.*, vi, p. 302.

The extraordinary officers must have been appointed to serve temporarily, for at the announcement of the treaty we find Colonel Mason writing that there were no civil officers in California save the alcaldes appointed or confirmed by himself. The alcalde was supposed to preside over the town council, when there was such a body, and to execute its ordinances. In the absence of a judge of first instance he might assume criminal jurisdiction. This imperfect organization satisfied in a way the simple needs of the pastoral Californians, but soon the conquerors outnumbered the conquered, and when the population, under the influence of the "cursed thirst for gold," leaped from about 10,000 or 12,000 in 1847 to something like 300,000 in three years, it may well be imagined that the need of a better organization was keenly felt.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 677.

[2] *Ibid.*, 762.

[3] *Ibid.*, 795, 807.

[4] *Ibid.*, 294, 435, 437, 452, 476, 779.

In the course of events an effort was made to meet some of these needs by extending the jurisdiction of the alcaldes. The commission of murder on board a ship in the autumn of 1847 led Colonel Mason to declare that such crimes could not go unpunished through lack of a higher judicial officer than the alcalde, and ordered that officer to take charge of the case. In all such cases trial was to be by jury, and the whole proceedings were to be submitted to the governor for his approval. At San José three men, charged with highway robbery and assault with intent to kill, were tried by a jury in an alcalde's court, found guilty, and executed without reference to the governor. When the matter was reported to him he approved what had been done, but said that it was not in his power to pay the costs of a trial not strictly legal. Just what was illegal does not appear, unless it was the execution of the death penalty, for which the governor said there was no competent civil court in California. Yet he had already authorized the execution of this sentence at San Miguel without reference to himself.[1] Captain Dring, of the British barque "Janet," was tried before an alcalde for receiving deserters from the United States navy, was found guilty and fined. Governor Mason, finding that "the fine had been imposed in a regular course of law," declined to interfere and directed the alcalde to imprison the captain until it was paid.[2] What the law was that authorized a court of California to try a foreigner for violating the laws of the United States it would be hard to determine.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 653, 691.

[2] *Ibid.*, 595.

To meet emergencies special tribunals were sometimes appointed. In the autumn of 1847 such a court was convened in the Sonoma district to try three men charged with the murder and kidnapping of Indians. The bill of costs presented to the governor by the members of this court was so enormous that he refused to pay it and made out one of his own, disallowing two charges altogether—one for Captain Brackett, who as a military officer was entitled to no extra pay in civil service, and $200 for Mr. Green as "attorney for the government," since he had not been appointed, and had not appeared in court.[1] In April, 1848, a special court was convened at Monterey to try three men for passing counterfeit gold coin purporting to be the coin of the United States. It is presumed that they were tried according to the Mexican law, as the governor asked the alcalde to look up that law on the subject.[2]

In the place of courts of appeal the governor sometimes heard appellants. Few cases came before General Kearny, nor did he seem disposed to interfere in such as did come. Governor Mason usually refused to interfere where the cases had been decided by a jury. In a few instances Governor Riley ordered a stay in execution until the case could be investigated, or carried to a higher court.[3] Sometimes appellants were curtly told to abide by the decision of the alcalde or await the organization of courts of appeal.

At last the needs of the growing country for a better judiciary became so pressing that the governor appointed some judges of first instance and decided to organize the supreme court. It was the prerogative of the governor to appoint the members of this court, but he requested the people to vote for them and promised to appoint the men of their choice, if competent and eligible. Two of the three elected soon resigned and others were appointed. However, this court was organized only a short time before the state government went into operation and probably never accomplished much.[1] A session was held at Monterey in September, 1849, but the business before the court was very small, as no appeals had been taken.[2]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 421 *et seq.*

[2] *Ibid.*, 540 *et seq.*, 571. [3] *Ibid.*, 391, 761, 681, 770, 782 *et seq.*, 853.

It will be recalled that Sloat and Stockton allowed the officials to hold over and promised the right of election to the people. Office-seekers were not wanting, for in the election at Monterey, September 15, 1847, seven candidates appeared for the office of alcalde. The Rev. Walter Colton was elected by a plurality of sixty-eight out of three hundred and thirty-eight votes. Some of the hold-over alcaldes refused to take the oath of allegiance to the United States imposed by General Kearny, whereupon others were appointed. After this the offices were filled irregularly, sometimes by election, sometimes by appointment. When elections were held the governor approved or disapproved the results before the alcalde could begin the discharge of his duties. In at least one case, at Los Angeles, he disapproved for no other stated reason than that he had not authorized the election. From other sources we learn that Colonel Stevenson thought the men elected unworthy to serve, one on account of his hatred of Americans, the other because of his ignorance and viciousness. The removal of these and the appointment of Foster produced considerable discontent at first, but this gradually wore away.[3] Something of a tempest was stirred up by one arbitrary removal.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 778, 832, 867.

[2] Burnett, *Recollections and Opinions of an Old Pioneer*, 346.

[3] Bancroft, v, 626.

At the election of September 15, John H. Nash was elected alcalde of Sonoma. For some unknown reason, not improbably favoritism, General Kearny ordered his removal from office, April 10, 1847, and appointed L. W. Boggs in his place. But Nash refused to vacate on the ground that he had been elected under Sloat's [Stockton's?] proclamation, and denied Kearny's right to remove him. Now this Boggs was an ex-governor and had known Mason in Missouri. When he appealed to his old friend, who had succeeded Kearny, the colonel refused to revoke the order, although the people of Sonoma had petitioned for its revocation, saying that, while he did not know the reasons for it, he felt bound to presume that they were good and sufficient. He then ordered Captain Brackett to help Mr. Boggs search the premises of Mr. Nash and seize the papers belonging to the alcalde's office. This order created much excitement in Sonoma and Captain Brackett asked to be excused from executing it inasmuch as he expected to settle there and did not wish to incur the ill will of the people. This aroused the ire of Colonel Mason, but Lieutenant W. T. Sherman appeased him somewhat and asked to be sent up to Sonoma to make a test case of it. His request was granted and he went, taking only one man, a private. He secured his prisoner at night and left with him early next morning for Monterey. When he explained to Nash that the government was military and that the will of the commander was supreme, the alcalde confessed that he had never seen it in that light and, being now thoroughly frightened, expressed his willingness to surrender his office. Colonel Mason treated him kindly and released him on his promise to return to Sonoma, surrender his office to Boggs, and give an account of his acts while in office.[1]

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[1] Sherman, *Memoirs*, i, 30 *et seq.*; H. Ex. Doc., 31 C. 1 S., no. 17, pp. 295, 317 *et seq.*

The right to appoint and remove from civil office, says Sherman, was never again questioned in California during the military régime. By this he must have meant before the treaty of peace, for after that not a little discontent did arise on that score, as we shall see later.

When elections were held the governor insisted that they should be regular. Alcaldes had to be instructed not to allow candidates to be judges of the election, as had been done at San José. Shortly after the proclamation of the treaty an election was held at San Francisco by Alcalde Leavenworth, who imposed property qualifications on the voters and excluded Mexican citizens. In consequence of this, and because due notice (three weeks) had not been given, Governor Mason declared the election void and ordered another to be held.[1]

Immediately after assuming command Governor Mason issued orders to the commanding officers at all posts and stations to aid the civil magistrates, when called upon, in executing the laws and carrying into effect their judicial decrees, directing them at the same time to perform this duty in a civil and courteous manner, using no more harshness than was absolutely necessary. Special orders for such assistance were occasionally given. The lack of prisons frequently rendered it necessary for the civil authorities to call upon the military to guard their prisoners. In one case a bill was presented against the municipality of Santa Barbara for the support of prisoners by the subsistence department.[2]

Sometimes the governor had to restrain his military subordinates from interfering with civil officers. At Santa Barbara the alcalde informed Captain Lippitt that the evidence did not warrant the conviction of two men charged with insulting some camp women, whereupon the captain took the men out of his jurisdiction. He also proposed to have a Californian tried according to martial law for stealing a rope from one of his soldiers. The alcalde resigned, but Governor Mason asked him to take charge again and ordered Captain Lippitt to cease from interfering in such trifling matters, citizens being amenable to military tribunals only for high crimes. But the captain again caused trouble, all about a saddle which he demanded of the alcalde until proof was furnished that no soldier had any claim upon it. As the alcalde did not deliver it with sufficient alacrity, the captain sent a squad of men to arrest him, if the saddle was not immediately given up. The alcalde did not appreciate such high-handed proceedings and again resigned. Governor Mason then ordered the captain to restore to the alcalde his insignia of office, as also the saddle, and to allow the civil law to operate in all cases of traffic between citizens and soldiers. Colonel Stevenson also interfered in a case where an alcalde had fined a woman for selling liquor to an Indian contrary to Mason's proclamation, and ordered a stay in the execution of sentence until the matter was referred to him for approval. When Governor Mason heard of this he ordered the colonel to let the law take its course.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 662.

[2] *Ibid.*, 302, 317, 334, 565, 569, 657.

But the superiority of the military was constantly asserted and sometimes acted upon. An alcalde was informed that even the order of a district commander must be obeyed. Nor did the governor hesitate to interfere directly with the decisions of the courts, when such interference seemed just and necessary. The Californians thought it no perversion of justice to retry cases which had already been decided, and the governor found it necessary several times to forbid this.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 563, 575.

So far as concerns the legal right of the commander to interfere, nothing need be added to the words of the Supreme Court already quoted.[2]

The town of Santa Barbara appears to be the only place on which a military contribution, aside from the import duties, was levied and this was done as a punitive measure. It appears that a gun disappeared from the brig "Elizabeth," which was lying at anchor there. As the thieves could not be apprehended, Colonel Mason ordered a contribution levied on the town, exempting such Americans as had, during the late revolution, contributed to the American cause.[3]

The lawfulness of such an act was questionable even then. In the Franco-German war, however, still severer punitive measures were resorted to by the Germans.[4] The law as agreed upon by the Hague Conference is that "No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."[5]

The money thus collected at Santa Barbara, $500.50, Governor Riley offered (April 30, 1849) to return to the town for the purchase or erection of a jail. A few months later he offered to duplicate from the "civil fund" whatever sum the town might raise for the erection of a jail and court-room, the sum not to exceed $6,000.[6] As good jails were scarce and very much needed, similar propositions were made to several other towns.[7]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 292 *et seq.*, 301, 412, 507, 565.

[2] *Supra*, 211.

[3] Doc., no. 17, pp. 573, 615.

[4] Hall, *Int. Law*, 491 *et seq.*

[5] Holls, 449.

[6] Doc., no. 17, pp. 754, 804.

[7] *Ibid.*, 558; Doc., no. 52, pp. 19, 38.

In the spring and summer of 1847 several Indian agents were appointed whose duty it was to advise the gentile Indians to "be good" and look to the President of the United States as their great father, with the assurance that he always took care of his good children. The agents were also to look after the "neophyte" or Christian Indians of the missions and see that they were not oppressed by their employers.[1]

The story of the missions, their secularization, the fraudulent sales, and the consequent litigation would fill a considerable volume. The secularization had already been made and sales had begun, had been suspended, and had begun again at the time of the conquest. In consequence of this it was hard to determine the true ownership, and the conquerors adopted the policy of maintaining them *in statu quo* until the question of title could be settled by competent authority. But some changes were made where rights seemed incontestable, or the public good required them. Several claimants appearing for the missions of San José, Santa Clara, Santa Cruz, and San Juan, General Kearny ordered the Catholic priest to take charge. A special order of ejectment was issued against the American immigrants at Santa Clara, but the priest finally made terms with them and allowed them to remain as tenants. Later this priest, "Padre" Real, was inhibited from selling the mission lands under a permit given by General Castro, dated May 25 and June 16, 1846. September 17, 1849, he was removed from the agency of the missions for maladministration and for selling and leasing the mission property. After this the management of the property was entrusted to a responsible citizen. In some cases alcaldes had to be enjoined from making sales of mission lands. Some immigrants wished to settle upon the mission lands still unsold, supposing that they were subject to the preëmption laws, but Governor Riley would not allow this.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 294, 358 *et seq.*

Practically the same policy was adopted in regard to other lands. When several claimants appeared the governor would only tell them to await the organization of tribunals competent to handle such matters. As the United States courts were rather slow in making their appearance, the people, in a few instances, endeavored to establish tribunals to try cases in which the government was interested. Gold-seekers were told that they had no legal right to dig on the public lands, but would not be molested until the United States government took action on the matter, and that the right of individuals to work in particular localities of which they were in actual possession would be left to the local judicial authorities. The Mexican law on the "denouncement" of mines was abolished by Governor Mason, February 12, 1848. Soon after this he made an exhaustive examination of two denouncements made just before the abolition of the law; one was declared void because the law had not been complied with, and the other was left for further investigation.[2]

March 10, 1847, General Kearny, as governor of California, issued a decree purporting to "grant, convey, and release unto the town of San Francisco . . . all the right, title, and interest of the government of the United States, and of the territory of California, in and to the beach and water lots" in a certain locality of said town, excepting such as might be selected by army and navy officers for government use, said lots to be sold at public auction for the benefit of the town. The validity of this act is discussed elsewhere in its relation to the character of the government under which California was held. September 30, 1847, Lieutenant W. T. Sherman informed the alcalde of San Francisco which lots had been selected for the United States.[1] Some of these lots sold as high as $600. Before the end of 1848 some changed hands at $10,000.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 291, 334, 433, 436, 453, 787, 810, 829.

[2] *Ibid.*, 476, 551 *et seq.*, 740, 789.

About a week after assuming charge of affairs Governor Mason said that he had no authority to grant lands in California, since he held only by a belligerent right, and that any grant he might make would be null and void if, at the definitive treaty of peace, Mexico should retain California. There was, indeed, not the slightest possibility that Mexico would ever recover California, but that made no difference. But, it being customary for the alcaldes to sell lots within the limits of their towns, the alcalde of Sonoma was authorized to carry out so much of General Vallejo's instructions from the Mexican government as related to the *sale* of lots in that town. May 9 and 15, 1849, Governor Riley informed the alcaldes of Monterey and San Diego that they could sell such municipal lands as had been regularly granted to the town, but that the pueblo or common lands could not be sold without the authority of Congress.[2]

III. Efficiency of the Military Administration

A military governor must have troops to enforce his decrees and, on the other hand, to give protection to such as submit to his authority.

The first thing to be done in California was to secure its conquest. No large force was required to do this, for in April, 1847, there were only 1,059 soldiers in the territory.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 291, 361.

[2] *Ibid.*, 321, 761, 765.

The major part of these consisted of the New York volunteers who had been mustered into service with the understanding that they were to be discharged in California or Oregon at the end of the war. The fleet, of course, rendered invaluable service on the coast. These forces were indeed sufficient to hold the country against a foe who never came to dispute it after the local insurrections described in an earlier chapter, and to overawe such of the inhabitants as may not have liked the new régime; but to give protection was another thing.

Here, as in New Mexico, the Indians caused no little annoyance, especially on the frontiers, where they would swoop down upon the settlers and drive off their livestock. General Kearny said that the Indians, both wild and Christian, had been badly treated by most of the Californians and thought themselves entitled to what they could steal as a recompense. He thought that a few presents, such as beads, red flannels, and tobacco, would help to appease them, and made a recommendation to that effect to the Secretary of War. A few such presents were given from time to time by the governor, and agents were appointed to deal with the Indians, but their depredations continued, especially in the neighborhood of San Luis Obispo. The people could not even protect themselves for lack of ammunition, the importation and sale of which was prohibited by executive order. Colonel Mason did not send any troops there, but advised the alcalde to organize a company of twenty-five or thirty men and hold them in readiness to move at a moment's warning. They would be supplied with ammunition, for the proper use of which the alcalde would be held responsible.[1]

Some of the trouble with the Christian Indians arose out of disputes about the lands on which they resided. This was true in the San Luis Rey district in particular. Here Colonel Mason ordered the *status quo* to be maintained until the disputes could be settled by the proper tribunals. Captain Hunter, sub-Indian agent, was ordered to let the chiefs know that, if they desired the friendship and protection of the American government, they must not only abstain from depredations upon the citizens of California, but must also endeavor to prevent other Indians from committing them. He was further advised to establish some kind of police among the Indians, making them appoint their own alcaldes, and to endeavor to induce them to gain a comfortable living by cultivating the soil.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 287, 496, 569.

The difficulty of affording adequate protection may be realized by glancing at the map. The population was not numerous and the settlements were scattered from San Francisco to San Diego. In July, 1848, Colonel Mason declared that his forces were hardly adequate to protect public property.[2] Soon after this the volunteers, who had enlisted for the war, were discharged; the regulars deserted for the gold fields. The dragoons in the south, who had followed Kearny across the continent, had remained faithful, but the colonel felt that they could not be counted on when brought to San Francisco. By September 1 he expected to have fifty soldiers fit for duty in California.[3]

A rather gloomy view of the conditions in the south was presented by Colonel Stevenson at Los Angeles (August 20, 1848). For months past the Indians had frequently come boldly into the country and shot down the people in the road and in the fields, taking from them their horses and other movable property. Now that the volunteers had been discharged and the dragoons were to be withdrawn, there was nothing to prevent them from plundering the town itself. The very best people of the town, those who had been the fast friends of the Americans in 1846, complained that, after all the sacrifices they had made, they were now to be abandoned to the mercy of the Indians and the worthless of their own countrymen. Their arms had been taken from them and now not more than forty-five old muskets, left by Fremont's battalion and repaired at the expense of the town, were to be had fit for use. The ammunition Colonel Mason had authorized him to issue would be worthless without guns. This picture he declared was not imaginary, but a true one; and he begged, in the name of humanity and our country, that, as soldiers could not be sent, arms might be issued to the people. In consequence of these representations the order to Captain Smith to bring the troops from Los Angeles to San Francisco was countermanded and they were left there until December. The inhabitants of the Sonoma district were told to rely upon themselves to put down Indian depredations.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, p. 438.

[2] *Ibid.*, 625.

[3] *Ibid.*, 603, 643.

In addition to this paucity of troops Colonel Mason reported (August 25) that there was not a war vessel on the coast of California. He was expecting one, but did not believe that she would remain long through fear of losing her crew.[2] A few months later he reported that while troops were needed, it would be useless to send them unless Congress provided them with pay bearing some proportion to the amount they could make in the country, and at the same time devised some laws by which deserters and those who enticed them away could be summarily and severely punished. Of the forty-six men who arrived in September only twelve remained. The dragoons did not wait to be brought to San Francisco before deserting. Of course no one was surprised at this when laborers were seen to refuse eight dollars per day.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 556, 642, 645, 650.

[2] *Ibid.*, 603.

In May, 1849, practically all the forces had been concentrated in the placer district, Sacramento valley, to assist in maintaining order, in consequence of which the request for troops at San Luis Obispo could not be met. San Juan Bautista was requested to elect an alcalde, who would be entrusted with ammunition. The government practically confessed itself helpless so early as March by issuing an order to the alcaldes, Indian agents, and others, begging them to take some measures to protect society from the Mission Indians and to save from destruction the Indians themselves who, freed from the restraints formerly imposed by the military and ecclesiastical authorities, had contracted habits of indolence and vice. The Indian agents were later said to have been of great service among the wild tribes.[2]

But the Indians were not the only enemies to law and order in California. The defect in the judiciary has already been noted. Yet this, assisted by the military, seems to have met the needs of the country for a while as well as could reasonably have been expected in a new and remote country. But the discovery of gold attracted adventurers from all parts of the world, and among these were many of the most lawless class, the flotsam of the social sea. They came, too, just at the time when the military authorities were least able to cope with them. Captain Folsom and Lieutenant Hardie, writing from San Francisco under date of August 14, 1848, represented existing conditions as intolerable and the outlook as hopeless. "The most mortifying state of things prevails here at this time," said the former. "Offences are committed with impunity; and property, and lives even, are no longer safe." In the governor's own town, Monterey, houses were forcibly entered and property taken from the owners in broad daylight, and the public stores were pillaged with impunity. A band of outlaws ravaged the country about Santa Barbara, murdering no less than twelve persons in two weeks. Yet it was the citizens, not the military, who brought them to justice. Finally, May 6, 1849, Governor Riley issued a proclamation calling attention to this lamentable state of affairs, laying most of the blame for it on "General Apathy" and the *auri sacra fames.* In closing he expressed the hope that all good citizens would assist the civil and military officials in preserving public order.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 648, 650, 711, 740.

[2] *Ibid.*, 689, 702, 758, 767, 789.

At this very time there was a flourishing organization of citizens in San Francisco, but with a constitution based on principles very different from those outlined by General Riley. It was composed of the riffraff of the New York volunteers and other kindred spirits, was called the Hounds, and had its headquarters in a tent called Tammany Hall. Its object was the support of its members at the expense of the community and the general promotion of vice. On election days the members were on hand early and voted often, as in the old Bowery days, and guarded the ballot-box while it was being stuffed. Their favorite color was copper, whether in Mexican, Chilean, or Chinaman. On the night of July 15, 1849, after an all-day orgy, they raided every Chilean tent that could be found and despoiled and scattered the occupants. The next morning General Apathy awoke with a start, rubbed his eyes, and speedily took what little of the law had been left into his own hands, along with such of the Hounds as could be captured. Nobody seems to have thought of appealing to the governor for help, nor is there any evidence that he ever thought of giving any.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 613, 680, 691, 760.

Color antipathy was also active in some of the mining districts, where the Americans and Europeans banded together and drove out all Mexicans and South Americans. In the summer of 1849 General Riley visited the mines and reported that peace and order were in general well preserved. However, he claimed no credit for this to the *de facto* government of California, as the miners in each locality elected their own judicial and police officers and sustained their decisions and official acts with regularity and energy. No doubt these officers sometimes exercised powers not strictly legal, but the general result had, he affirmed, been for the preservation of order and the dispensation of justice.[2]

Regarding the character of the higher officials in California little need be added to what has been brought out in the narrative. Perhaps enough has already been said about the adventurer Fremont, who tried to exercise the functions of governor for a while. General Kearny's term was short, but apparently satisfactory to the Californians and to his superiors. Colonel Mason ruled longest and as acceptably as could have been expected while occupying a position then regarded by everybody as so anomalous and at the same time facing problems becoming more and more complex. He had been in the army some thirty years, but had never occupied such a position before and probably had read very little about it in the books on war. A careful reading of his official papers must convince any one that he realized the importance of the trust committed to him and that he desired to perform his duties in such a way as to meet the approval of his superiors and, so far as possible with the defective machinery at his command, to give the Californians a good government. He was something of a watch-dog over the treasury, but the writer is unable to say whether the sum which he borrowed from the "civil fund" was ever paid back. No detail or appeal seemed too trivial to merit his notice, whether is was ordering a man to stop taking tiles from an old uninhabited mission to repair a house said by him to have been burnt by Fremont's order, or directing another to return two millstones to a Catholic priest. Just what his views were on the temperance question is not known, but he issued very peremptory orders to Captain Lippitt to break up the gambling dens and grog-shops at Santa Barbara. General Riley also was an old soldier, likewise watchful of public and private interests in small affairs.[1] Sometimes the mind which looks so closely to the smaller details lacks what is requisite for larger things. However, it would hardly be fair to attribute the mistakes made by the governors in their appointments to office to their inability to estimate men. They probably did the best they could with the information and material at hand, with society in a state of flux and flow, and under conditions which they did not feel at liberty to alter.

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[1] Bancroft, *Popular Tribunals*, i, 76 *et seq.*

[2] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 787 *et seq.*

For his subordinates Colonel Mason, in his reports, had only words of praise. H. W. Halleck, then a lieutenant of engineers, served as secretary of state from August 13, 1847, to the end of the military régime and wrote many of the executive orders and letters. Of all the men in California he was, perhaps, the best informed respecting the rights and duties of a military occupant. A few years after leaving California he published a book on international law, generally recognized as a standard work, in which these matters are thoroughly discussed. General W. T. Sherman also, then a lieutenant, was in California for a while and sometimes rendered his services to the "civil" government, though never an official in it.

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 550, 649, 702.

Colonel Mason was especially warm in his praise of Colonel J. D. Stevenson, who had command of the southern district, declaring that he possessed in a peculiar degree the tact and firmness required to preserve discipline among his men and harmony among the inhabitants. Colonel Mason probably had forgotten the occasion on which he had to restrain this very officer from interfering with the civil affairs of his district, though this was done in a very courteous manner, with the statement that his motives were not questioned. The New York volunteers made no very enviable reputation in California, but those stationed at Los Angeles under the immediate command of Colonel Stevenson appear to have been more orderly than some of the others. "The time for discharge," said Colonel Stevenson, "found many a poor fellow, after two years of faithful service, without a dollar beyond the small amount due as wages; and if they pay the few small debts they owe here, they will not have money sufficient to buy a pair of shoes; and I know that many, if not all at this post, possess so high a sense of honor that they would go barefooted rather than leave in debt to any one in the town. Thank God, all here have acted honorably and fairly to the people of the country, and I trust they will do so to the end!" Concerning the efficiency of the service at this place Colonel Mason said: "I will warrant that at no previous time in that district were life or property so secure, the magistrates of the country so effectually supported, and industry encouraged, as during the past two years; one common cry of regret arose at the order for their disbandment; the little petty (*sic*) causes of complaint were forgotten in the remembrance of the more substantial advantages they had enjoyed under the protection of the military." [1] In the spring of 1849 some friction arose between the civil and military authorities in this district, but the trouble does not appear to have been serious.

But one officer of Colonel Stevenson's regiment, Captain F. J. Lippitt, stationed at Santa Barbara, was not so successful. His readiness to interfere with the civil authorities has already been noticed.[2] When he called upon Colonel Mason (July 16, 1847) for reinforcements to repel a threatened attack by the Californians the colonel declared that this state of affairs was due entirely to the lawless acts of violence committed upon the people by the New York volunteers. Some months later Colonel Mason again wrote that he had heard many unfavorable reports of these men, one of which characterized their conduct as a "disgrace to their country." [3]

Discharged soldiers were, of course, no more subject to military control than were the citizens, but some of them seem to have taken their discharge as a special license. When the three companies from Lower California were discharged at Monterey some of them committed gross acts of pillage upon public and private property, and took forcible possession of a public building belonging to the town authorities, which they occupied for some days and wantonly injured to a considerable extent. Deserters also affected to retain for a while the right to levy contributions upon public and private property, plundering ranches on the road to the gold fields because unable to carry provisions with them.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 644, 651, 767.

[2] *Supra*, 235.

[3] Doc., *ibid.*, 330, 482.

Throughout the greater part of the military régime about the only subordinate officials were the alcaldes. The election of the Rev. Walter Colton at Monterey has already been referred to.[2] He tells us that he was elected by the citizens of Monterey, but does not say how many sailors considered themselves as citizens on election day. He dispensed justice for some time as best he could from his sense of right and a very imperfect knowledge of Spanish and American law and Californian custom. He summed up his power by saying that there was not a judge on any bench in England or the United States with powers so absolute. A few days before the election—he had already been appointed alcalde by Commodore Stockton—Mr. Colton summoned the first jury ever impaneled in that part of the country. One-third of this jury were Mexicans, one-third Californians, and the rest Americans. With the exception of the Americans they spoke the Spanish language. The plaintiff spoke English, the defendant French, and the witnesses all the languages known to California. The parties to the suit accepted the verdict without a word of dissent and the inhabitants expressed their satisfaction with jury trial as affording no opportunity for bribery. But juristic duties were not allowed to interfere with ecclesiastical. "I often plan my sermons," says the alcalde, "while some plaintiff is spinning a long yarn about things in general, or some defendant is losing himself in a labyrinth of apologetic circumstances. . . . My text might often be, 'And he fell among thieves.'"[3] Either the alcalde's sense of right or Californian custom must have been somewhat perverted at times, judging by his own account. Fining a man ten dollars for charging eight dollars for a pair of prison-door hinges and for using angry words when arraigned by the alcalde for the excessive charge can hardly have been according to either Mexican or American law.[1] When we consider his varied duties and pursuits—fishing, hunting, and running a newspaper, in addition to those already named—it can hardly be surprising if irregularities sometimes crept in. About the time of the proclamation of peace a native lodged a formal complaint against his official conduct, but Governor Mason replied that interference was now unnecessary, as peace had been proclaimed; besides, the proper courts for the settlement of litigation would soon be established. Mr. Colton's successor, Alcalde Esquer, found the books of the land office in bad shape, the record not showing what lands had been sold by his predecessor and what were still saleable.[2]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 651, 899.

[2] *Supra*, 232.

[3] Colton, *Three Years in California*, 45, 47, 55.

May 28, 1847, George Hyde was appointed alcalde of San Francisco, the third since the American occupation. By October 1, Colonel Mason had received three petitions for his removal. As charges of a serious nature were made against him, the colonel appointed the town council a committee to investigate them and report to him. Some months later they reported that they, "having been by you entrusted with the affairs of Mr. George Hyde, would respectfully recommend his removal from office." Thereupon the colonel called for the record of their proceedings, with the evidence on each charge. Their reply showed that only two charges had been investigated, nor was the evidence in regard to these given.[3] Bancroft thinks that most of the trouble was due to personal enmities, business cliques, and newspaper rivalries. About this time Mr. Hyde resigned, but later he took a prominent part in the "legislative assembly," of which we shall hear more hereafter.

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[1] Colton, *Three Years in California*, 240.

[2] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 594, 761.

[3] *Ibid.*, 306, 494, 499 *et seq.*

Mr. Hyde's successor soon left for the mines, whereupon the people petitioned for the appointment of Lieutenant Edward Gilbert, but this Colonel Mason refused on the ground that his duties as an officer of the army would not allow it. Another man was then asked for, but the colonel refused this also and ordered an election. After two elections, the first being annulled by the governor for reasons given elsewhere, Dr. T. M. Leavenworth, who was elected both times, assumed the duties of the office. This gentleman seems to have been careless in some respects and arbitrary in others. His conduct was one of the causes which led to the "legislative assembly." The sweeping charges made by that body against alcaldes in general, but evidently aimed at Dr. Leavenworth, will be set forth later. The excuse given by Governor Riley for not investigating these charges was that there was no "legal tribunal" for that purpose; besides, there being no other magistrate in that district, he could not with propriety remove him. A specific charge was for assuming authority to order the transfer of an important prisoner to Sonoma and allowing him to escape. For this he was rebuked by Governor Riley, who informed him that only the governor could authorize such orders. Complaint followed complaint, one being from a native that the alcalde was trying to deprive him of his property without legal measures, until Governor Riley finally overrode his scruples about a "legal tribunal" and appointed a committee to investigate the charges and see if there was sufficient cause for his removal. The same day Dr. Leavenworth was suspended from office, but was restored June 1.

Soon after this his resignation was sent in, and was accepted to take effect upon the election of his successor.[1]

William Blackburn served as alcalde of Santa Cruz nearly two years, being appointed by Governor Mason in June, 1847. A few weeks after this appointment a jury found Pedro Gomez guilty of wife-murder and Blackburn had him hanged two days later. When Governor Mason reprimanded him for not following the law and custom of referring serious cases to the governor, the alcalde replied that there was no doubt of the man's guilt and that there was no use to make any fuss about it. On another occasion he administered the Mosaic law of "an eye for an eye and a tooth for a tooth" in a trivial case which should have been settled in the nursery.[2]

Among Governor Riley's last appointments was that of William B. Almond, whose commission was dated October 1, 1849, but who did not open court until December 12, just eight days before Governor Riley laid down the reins of government which had long been slipping from his hands. Almond had been a peanut-vender, but was recommended by the members of the supreme court, and by the Hounds, too, if we may believe Bancroft, though that fraternity had been broken up some months before according to the same author. His jurisdiction was limited to civil cases only, and the rendering of justice in these was soon made far more lucrative than peanut-selling. The judge's "ounce" (venality) became a by-word. His trials were never long drawn out. One witness would be singled out and asked to tell a straightforward story, after which the decision was rendered. In one case he assumed admiralty jurisdiction and awarded one hundred dollars salvage to a boatman who had picked up a dismantled launch. But on learning that the boatman's counsel fees and court costs amounted to two hundred dollars he raised the judgment to that amount. The owner refusing to pay, the launch was sold for one hundred and fifty dollars and he was compelled to pay the other fifty.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 568, 662, 749, 755, 758, 774, 782.

[2] Hittell, *History of California*, ii, 659 *et seq.*; Colton, 388.

But it would not be fair to estimate the character of all the alcaldes in California by those just mentioned. The few soldiers and sailors who served in that capacity do not call for notice for anything specially good or specially bad. Several Mexican names occur in the correspondence with the alcaldes. They appear to have been about on a par with others, both as to the uprightness of their intentions and knowledge of how to conduct their offices, a little better in the former, perhaps, than some who have claimed more space.

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[1] Bancroft, *California Inter Pocula*, 591 *et seq.;* H. Ex. Doc., 31 C. 1 S., no. 17, p. 832.

CHAPTER VII

END OF THE MILITARY REGIME

I. MANIFESTATIONS OF DISCONTENT AND THE CALL FOR A CONSTITUTIONAL CONVENTION

WHEN the period under review is considered as a whole, real grievances and causes of discontent are not hard to find. Nor is the reason for this far to seek. Perhaps some of the troubles might have been avoided by prompt action on the part of those with whom the responsibility rested at the end of the war, but that all of them could have been is not a conclusion so easily reached.

Viewed in the abstract, the rights and duties of the military occupant are simple enough. The natural inference is that the political system and private law of a country enjoying a fair degree of internal peace are suited to the needs of the inhabitants and acceptable to them. Even if not, it does not appear to be the duty of the military occupant to alter them, nor his right, except so far as his own interest and safety may be concerned. Under ordinary circumstances, then, one would expect the old system to be continued with a reasonable degree of satisfaction to the inhabitants. Had there been nobody in California between the years 1846 and 1850 except the people whom Commodore Sloat found there when he first raised our flag at Monterey, the story of those years would have been far different from that which has been related. But suddenly California awoke from a long and dreamy sleep and her joints cracked and her bones ached as did those of Rip Van Winkle after his long sleep beside the Hudson, with this difference, however—her pains were those of growing youth, not of decrepit old age.

The bonds of society began to loosen with the very landing of the Americans; or perhaps it would be more nearly correct to say that the new society which was forming there soon realized the necessity of again drawing closer the bonds which had been loosened or broken in the weary trail over the plains or the long voyage by sea. A government administered under the old laws and on the old principles might have satisfied the needs of the Californian asleep in the sun or of the Mexican twanging the strings of his guitar or dancing the gay fandango, but a new life was pouring upon the shores of the Pacific. To endeavor to confine this in the old shackles was only to repeat the mistake of putting new wine into old bottles. Where the saving strength lay we shall soon learn.[1]

We are told that some discontent was manifested by the Californians over the failure of their new masters to keep Commodore Stockton's promise that they should share in their own government, at least to the extent of electing their own local officers, but if such discontent ever really existed, it never became serious on the part of the natives. A question of vital concern was that of the taxes. Alcalde Colton has left us an epigrammatic, not to say hysterical account of California's woes in this respect: "Through the exactions of the customs-house the comforts and necessaries of life were oppressively taxed. No article of food or raiment could escape this forced contribution; it reached the plough of the farmer, the anvil of the smith; the blanket that protected your person, the salt that seasoned your food, the shingle that roofed your cabin, and the nail that bound your coffin." [1] There is other evidence that the tariff proclaimed by order of the President in 1847 was slightly burdensome, but it was generally acquiesced in, at least till the end of the war.[2] What was done by the authorities in California to lighten the burdens that were most oppressive has already been brought out in the course of the narrative.

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[1] It is hardly necessary to repeat here that the delay on the part of Congress in providing a government for California was caused by the inability of the political parties in that body to come to an agreement over the question of excluding slavery from the new territory.

Nevertheless, some of the policies connected with the tariff appear to have been in effect oppressive. One of these was to exact duties in lawful money. Since the amount of circulating medium was small and the expenses of the government were very light, this policy soon resulted in the congestion of a large part of the ready money in the territorial chest. To relieve this situation the governor for a while allowed the collectors to receive gold dust on deposit, apparently at a higher rate than the dust then commanded in San Francisco, its value having depreciated owing to the lack of coin and of minting facilities. Still one must believe that not a little of the discontent was due to the previous training of the Americans, for it was they by whom the restiveness was manifested. Recalling the lessons conned in their school histories, they now declared that they were being taxed without their consent, and, a thing which aggravated the situation all the more, were not compensated with a government competent to secure liberty and property. The American mind is nothing if not legal, a fact which added all the more to the odium with which the government of California was regarded, since many believed that its right to existence ceased with the conclusion of peace.[1] Moreover, the very name of military government was odious to Americans. Had they not carefully subjected the military to the civil power in their fundamental law? To the feeling of hatred of military governments in general was added that of contempt for this one in particular; for had it not confessed its weakness in acknowledging that it had no powers of legislation and in telling the people that they must look to themselves for protection?

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[1] *Three Years in California*, 397.

[2] Memorial by California's Senators and Representatives elect, H. Misc. Doc., 31 C. 1 S., no. 44, p. 3.

The feeling of need for a government of defined powers found expression so early as February, 1847, in the demand of Dr. Robert Semple, editor of the *California Star,* for a constitutional convention. The doctor justified the demand by the declaration that alcaldes all over the country were "assuming the power of legislatures, issuing and promulgating their bandos, laws and orders, and oppressing the people."[2] If there was any alcalde assuming such powers at the time, it must have been the doctor's own partner, the Rev. Walter Colton, for we have seen elsewhere that he boasted of powers greater than those of any judge in England or the United States. But such of the natives as had held over probably were astonished at this charge. Sometimes complaints were made of stretches of authority, in the abuse of which American officers must share the blame; but complaint was also made of the powerlessness of the alcaldes, and the governor occasionally had to order them to assume greater authority. Later on the alcaldeship became the centre around which gathered a struggle of no little import.

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[1] H. Misc. Doc., 31 C. 1 S., no. 44, pp. 4 *et seq.;* Burnett, *Recollections and Opinions of an Old Pioneer,* 294, 311 *et seq.*

[2] Bancroft, vi, 261.

About the time that the tariff began to be something of a real burden, Dr. Semple published an article (October 21, 1848) in which he argued against the legality of these exactions, declaring that the ports of California were "as free as the island of Juan Fernandez" until the revenue laws of the United States were extended over them.[1] At the same time the discontent was being fomented from without. The motives back of the letter of Senator Benton to the people of New Mexico and California may not have been—probably were not—very bad, but the letter itself must be characterized as remarkable, not to say seditious. Writing under date of August 27, 1848, he said:

> While your condition is anomalous and *critical* and calls . . . . for the most exalted patriotism on your part, the temporary civil and military government established over you, as a right of war, is at an end. The edicts promulgated by your temporary Governors (Kearny and Mason, each an ignoramus) so far as these edicts went to change the laws of the land, are null and void, and were so from the beginning . . .
>
> Having no lawful government, nor lawful officers, you can have none that can have authority over you except by your own consent. Its sanction must be the will of the majority. I recommend you to meet in convention—provide for a cheap and simple government—and take care of yourselves until Congress can provide for you.
>
> Imports which have paid no duties to the United States should pay them to you moderately, so as not to repress trade, or burthen consumers: say 20 per centum on value whence imported.[2]

Just when this letter was received in California is not known to the writer. It was published in the *Alta Cali-*

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[1] Bancroft, vi, 266.

[2] Niles, lxxiv, 244.

fornia of January 11, 1849. A month before this the local movement for the organization of a government for California had begun to take definite shape. December 11, 1848, a public meeting was held in the alcalde's office at San José, over which Charles White, the former alcalde, presided. This assembly called a convention to meet at San José on the second Monday in January to form a civil government, and elected three delegates to it. This call was concurred in by meetings held at San Francisco December 21, at Sacramento January 6 and 8, and at Monterey some time in January. The resolutions adopted at San Francisco claimed that the duties collected in California since the treaty of peace rightfully belonged to California. Those adopted at Sacramento recited that, Congress having failed to extend the laws of the United States to California, the citizens were left without any laws for the protection of life and property; and that, in view of the frequency and impunity with which crimes were committed, it was necessary and proper to form a provisional government to enact laws and appoint officers to administer them until Congress should see fit to extend the laws of the United States. Both of the latter assemblies appointed committees of correspondence and suggested March 5, 1849, as the day of meeting. Soon afterwards, however, the San Francisco committee proposed a postponement to May 6, on account of the inclemency of the weather and the prospect of action by Congress. The postponement was carried over the protests of the Sacramento delegates, and later the meeting was again deferred till the first Monday in August. Nothing ever came of this call.[1]

The chaotic condition of affairs was now pressing so heavily that three districts, Sonoma, Sacramento, and San

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[1] Bancroft, vi, 269 *et seq.;* Burnett, 296, 317; Colton, *op. cit.*, 373.

Francisco, took measures for the organization of local legislative bodies. Those of Sonoma and Sacramento soon dissolved, but that of San Francisco deserves more extended notice.

December 27, 1848, an election was held at San Francisco for a town council, an instrumentality of government authorized by Governor Mason more than a year before. A majority of the old council declared this election void because unqualified voters had been allowed to participate, and ordered a new one for January 15, 1849. The *Alta California* tells us that four-fifths of the citizens regarded this as an unwarranted assumption and refused to participate in the January election. However, an election was held and resulted in two sets of councilmen claiming office at the same time. The situation soon became serious and a public meeting was called for February 12. When this body met it was asked to pass upon a sort of constitution, consisting of a preamble and two articles of several sections, prepared in advance by Mr. Hyde, the former alcalde. This constitution provided for the election of a legislature to make laws not repugnant to the Constitution of the United States or the common law, and of three justices of the peace, all to hold office one year, unless sooner superseded by competent authorities of the United States government, or by the prospective provisional government, or by action of the people of the district. After adopting this constitution the assembly called for the resignation of both the town councils and appointed a committee to see that the request was complied with.

Monday evening, March 5, 1849, the "Legislative Assembly of the District of San Francisco" met at the Public Institute and proceeded to business. It was a unicameral body of fifteen members and organized by the election of Francis J. Lippitt as speaker. A special committee of three was then appointed to confer with the judges of the district and report a code of laws as soon as practicable. A temporary treasurer was appointed and empowered to receive the funds from the officers of the late government. A committee was then appointed to wait upon General Persifor F. Smith and Commodore Thomas C. Jones, the senior military and naval officers in California, and secure their approval of the "assembly's" work.

In justifying the "assembly" the committee said in substance: The Mexican law had been declared to be in force, but had never been promulgated to the people. The only existing judicial officer, the alcalde, never could, and never did, administer that law; but all civil and criminal cases were determined according to his notions of right and wrong. His will alone was law, and this arbitrary power had been abused for the purpose of gratifying personal malice and of promoting his aggrandisement. Appeals were sometimes heard by the governor, sometimes the right of appeal was denied or evaded. This condition of affairs led inevitably to the conclusion that the Mexican law had never been actually in force since the American occupation and that there was no sanction of government in California. The committee further were of the opinion that this was the view of the President and of Congress; for, if the Mexican law had been in use, there must necessarily have been a government organized *de facto,* requiring an executive power to see that the law was duly administered. It would have been the duty of the President to nominate, and of the Senate to confirm, an executive for that purpose. The President had said in his last annual message that he had "*advised*" the people of this territory, upon their "presumed consent," to submit to the government set up by the military as the government *de facto,* which it was not. This advice, though never received until this time, had been followed to a certain degree until the system became too oppressive. As the President had merely advised, and left the matter to the consent of the people, it was clear that the consent of the people must first be obtained before the government could be *de facto* in force; and, without that consent being given, they had the right to create any government deemed necessary for their protection.

General Smith merely expressed his opinion as to the legality of their action and gave some advice for the future. The military government set up in the course of the war had, he said, been continued, after the treaty of peace, as a government *de facto,* which could be superseded by Congress alone, that body having exclusive power to legislate for the territories. The consent of the people *must be presumed,* because no people would intentionally fall into a state of anarchy, which would be the only alternative were the *de facto* government abrogated before Congress provided another. He did not question their motives, but thought that the opinion of those in authority at Washington, which was decidedly against the proposed action, should be deferred to. There was not only the disposition, but also the law and power, to remove and punish any officer clearly proved to be guilty.[1]

This was not, however, the kind of advice which the "legislature" was seeking and it pursued the uneven tenor of its way. May 1 General Smith reported that judges were being appointed with a view to trying certain cases in which the government was interested before the establishment of the United States court. It was not his purpose to employ the military force to overthrow these usurpations, unless absolutely driven to it, but he asked for the opinion of the attorney-general as to what course Governor Riley should pursue to stop the proceedings of these illegal tribunals.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 729 *et seq.;* Bancroft, vi, 271 *et seq.;* Burnett, 307 *et seq.*

At last Governor Riley appears to have realized the necessity of taking some action. The course adopted was to suspend Alcalde Leavenworth, the chief occasion of the trouble, and order an investigation of his conduct, with the results already described.[2] On the same day he issued a soothing proclamation, saying that he had been directed by the Secretary of War, while acting as governor of California, to use the military to assist the civil authorities in executing the laws and maintaining public tranquillity. All good citizens were called upon to give their cordial aid and coöperation in this work.[3]

Meantime the "legislative assembly" continued its sessions, enacting laws, creating and filling offices, such as register, sheriff and treasurer, and imposing and collecting taxes. The office of alcalde was abolished, and when the people had elected three justices Dr. Leavenworth was ordered to hand over the records of his office to one of these, Myron Norton, who had presided at the primary assembly. Dr. Leavenworth, however, was not so ready to obey and had to be forcibly dispossessed.

This action called forth another proclamation (dated at Monterey, June 4) from Governor Mason, in which he recited the misdeeds of "a body of men styling themselves 'the legislative assembly of the district of San Francisco'" and warned all persons "not to countenance said illegal and unauthorized body, either by paying taxes or by supporting or abetting their officers." All good citizens were further called upon to assist in restoring the alcalde's records to their lawful keeper, and in sustaining the legally constituted authorities of the land. The next day he gave notice of the acceptance of Dr. Leavenworth's resignation, appointed judges and inspectors of elections, among whom were some who had taken part in the "assembly," and ordered them to see that all vacancies in the town government were filled.[1]

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[1] H. Doc., *ibid.*, 740. [2] *Supra*, 251. [3] H. Doc., *idid.*, 758, 760.

Along with these appeared another and more important proclamation, dated June 3, 1849. The first part of this paper, which attempted to justify the general's claim to the position of governor and to remove the prejudice against the *de facto* government by declaring that it was civil and not military, has already been quoted.[2] As some endeavored to justify the proceedings of the legislative assemblies by comparing the condition of California to that of Oregon, where the people had assumed legislative powers, the governor now pointed out that their conditions were not similar. Oregon was without laws, while California had a system of laws which, as in the case of Louisiana, continued in force, so far as not in conflict with the Constitution and laws of the United States, until altered by competent legislative authority. As Congress had failed to organize a new territorial government it had become his imperative duty to take some active means to provide for the existing wants of the country. This could best be done by putting in full vigor the administration of the existing laws and completing the organization of the civil government by the election and appointment of all officers recognized by law. Accordingly it was ordered that elections be held for certain officers, especially the judges of the superior court, prefects and sub-prefects. At the same time delegates should be chosen to a convention which should meet September 1, to form a state constitution, or a territorial organization, to be submitted to the people and then to Congress. The districts were named and a specific number of delegates was allotted to each, with the proviso that, if any district should think itself entitled to a greater number of delegates, it might elect additional ones whose admission would depend upon the will of the convention. The places for holding the election and the qualifications for suffrage also were prescribed. The proclamation closed with the statement that this was the course advised by the President and by the Secretaries of State and War as most likely to avoid the innumerable evils which would necessarily result from any attempt at illegal local legislation. For this reason it was hoped that the good citizens would approve the plan and unite to carry it out.[1]

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[1] H. Ex. Doc., 31 C. 1 S., no. 17, pp. 773 *et seq.*

[2] *Supra*, 211 *et seq.*

The information upon which this action was taken must have been unofficial, for the Hon. Thomas Butler King, the confidential agent of the new administration, did not reach San Francisco until June 4. As he did not stop at Monterey his instructions cannot have been communicated by him to General Riley.[2] However, the general's action was in harmony with those instructions which ordered Mr. King to "assure them [the people of California] of the sincere desire of the Executive of the United States to protect and defend them in the formation of any government, republican in its character, hereafter to be submitted to Congress, which shall be the result of their own deliberate choice. But let it be, at the same time, distinctly understood by them that the plan of such a government must originate with themselves, and without the interference of the Executive."[3]

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[1] H. Doc., *ibid.*, 776 *et seq.*

[2] *Ibid.*, no. 59, p. 5.

[3] *Ibid.*, no. 17, p. 10.

June 14, the *Alta California* contained an "Address to the People of California from the 'Legislative Assembly,'" a paper prepared several days before. After speaking of the mixed character of Californian society, the address continued:

> But, perfectly anomalous as may be the state of our population, the state of our government is still more unprecedented and alarming. *We are in fact without government*—a commercial, civilized, and wealthy people, without law, order, or system, to protect and secure them in the peaceful possession of those rights and privileges inestimable, bestowed upon them by their Creator, and holden by the fundamental principles of our country, to be *inalienable and absolute.*
>
> For the first time in the history of the "model republic," and perhaps in that of any civilized government in the world, the Congress of the United States, representing a great nation of more than twenty millions of freemen, have assumed the right, not only to *tax us without representation,* but to *tax us without giving us any government at all*—thus making us feel, endure, and bear all the BURTHENS of government, without giving us even a distant glimpse of its BENEFITS. . . . . Under these circumstances, and impressed with the urgent necessity of some efficient action on the part of the people of California, the Legislative Assembly of the district of San Francisco have believed it to be their duty to earnestly recommend to their fellow citizens the propriety of electing twelve delegates from each district to attend a general convention to be held at the Pueblo de San José on the third Monday of August next, for the purpose of organizing a government for the whole Territory of California, ... and to form, if they upon mature deliberation should deem it advisable, a State Constitution, to be submitted to the people for their ratification or rejection by a direct vote at the polls. . . . . From the best information, both parties in Congress are anxious that this should be done.[1]

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[1] Burnett, 320.

On its face this appeared like an open defiance of Governor Riley, since he had appointed a different time and place for holding the convention. An editorial paragraph explained that the "Legislative Address" had been prepared and adopted before the publication of General Riley's proclamation in San Francisco, and that it therefore had no reference to or necessary connection with that document. Internal evidence shows that it was prepared after the arrival of the "Edith," May 28, and possibly after that of Mr. King, June 4, with the information that the revenue laws had been extended to the new territory. Mr. Peter H. Burnett,[1] who had presided over the Sacramento meeting in January and had now become a leading member of the "legislative assembly," prepared the "Address," in entire ignorance, he says, of General Riley's intended proclamation. But whatever may have been the circumstances of its preparation, it could have been suppressed, had its sponsors been disposed so to do, for the governor's proclamation was known in San Francisco June 9, five days before the "Address" appeared.

June 12, a "large and enthusiastic mass-meeting of the citizens of San Francisco" was held in Portsmouth Square. Mr. Burnett first addressed the meeting, and closed by presenting the Hon. Thomas Butler King, who "responded to the call with his accustomed eloquence and ability." After a few more speeches resolutions were brought forward, the first of which declared that, as Congress had failed to act, the people of California had the undoubted right to organize a government for their own protection. Two others called for a convention to form a constitution for a state government and invited all to unite in the effort "to establish a government in accordance with the Constitution of our beloved country." If this resolution was adopted, a committee of five was to be appointed to correspond with the other districts, fix an early day for the election of delegates, and appoint the time for the meeting of the convention.

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[1] Peter H. Burnett was born in Nashville, Tennessee, November 15, 1807. Nashville was then a pioneer settlement and was thoroughly imbued with the pioneer spirit. As civilization moved westward he kept pace with it, and finally landed in Oregon, where he arrived in time to take part in the popular movement for the organization of a government and was elected a judge of the superior court. The discovery of gold in California proved the magnet which drew him to that country. Here also he took a leading part in public affairs and sought to apply the principles of squatter sovereignty which he had seen carried out in Oregon. He was prominent in the movement for a state government and was elected first governor under the new constitution.

Some slight opposition to these resolutions was manifested in the discussion. An amendment was proposed for the adoption of the days appointed by General Riley. This, however, was opposed by Colonel J. D. Stevenson and was voted down, whereupon the original resolutions were adopted.[1]

Ten days after this meeting was held Governor Riley issued another proclamation making further regulations for the election of delegates and officials. In closing he said: "It may not be improper here to remark that the instructions from Washington, received by the steamer "Panama," since the issuing of the proclamation of the 3d instant, fully confirm the views there set forth; and it is distinctly said in these instructions that 'the plan of establishing an independent government in California cannot be sanctioned, no matter from what source it may come.'"[2]

This warning from Secretary Crawford was called forth by a sentence in a letter from General Smith, dated Mazatlan, February 15, 1849, which read: "I find some persons going out armed with Colonel Benton's letter to set up a government for themselves."[1] Exactly what Mr. Crawford meant by "independent government" is not clear. He does not appear to have had in mind a government absolutely independent of the United States, but one set up on the lines suggested by Senator Benton and in control of the revenue. Such a government, said Secretary Crawford, would set aside the laws relating to the customs and the postoffice, which had been extended to California, a thing which the President could not tolerate.[2] Had Governor Riley quoted the entire paragraph, the people might possibly have guessed at a meaning which would have harmonized it with the instructions to Mr. King, but with the one brief sentence given they could only be mystified and exasperated. The idea of instituting a government independent of the United States does not appear to have occurred to anybody and the thought of such a thing was repelled as a libel upon the people of California. If the quotation did not refer to this, what did it mean? Were they now forbidden to institute a government upon their own initiative, a thing they had been told by Mr. King to do?[3] That the Administration had no notion of discouraging the movement for a state government is shown by a letter from Secretary Crawford, dated June 26, 1849. In this he said: "The opinion is advanced that it is the right of the people of California to assemble by their delegates and adopt a form of government which, if approved by Congress, may lead to their admission into the federal Union as one of the confederated States."[4] The publication of the brief extract was unfortunate and only added to the general irritation. The "legislative assembly" took a parting shot at the governor by declaring his proclamations of June 3 and 4 "uncourteous and disrespectful."[1]

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[1] Burnett, 322 *et seq.*

[2] H. Doc., *ibid.*, 785.

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[1] H. Doc., *ibid.*, 710.

[2] *Ibid.*, 273 *et seq.*

[3] Burnett, 327 *et seq.*

[4] H. Doc., *ibid.*, 276.

Meantime the committee of five appointed by the public meeting of June 12 had gone to work and soon found that the other districts were disposed to concur in the dates fixed by Governor Riley. Then the committee not very gracefully retired by declaring that they did not recognize "the least power, as a matter of right, in Brevet Brigadier-General Riley to 'appoint' a time and place for the election of delegates and the assembling of the convention," but that, as these matters were subordinate to the great leading object—the attempt to form a government—in which all should be united, they recommended concurrence in the time and place mentioned by the general. They further expressed the opinion that some localities, the mining districts in particular, had not been given a just proportion of the delegates and recommended the selection of an increased number.[2]

Before leaving this subject it is proper to remark that the friction appears to have been more formidable on paper than it was in reality. June 30, General Riley reported that he had visited San Francisco and had found that the more respectable members of the so-called "district assembly" were convinced of the impropriety of the course pursued by that body and that all difficulties would be amicably arranged. All were desirous of securing a state government, but they did not like the idea of being dictated to by a military man, a thing which they regarded as not only illegal, but as somewhat odious, considering that the military should always be subject to the civil power. Neither appears to have seriously questioned the motives of the other and in the end it became mainly a question of technical legality. Speaking of General Riley, Mr. Burnett, one of the leaders of the assembly, said: "I bear a willing testimony to his integrity and patriotism. I afterwards met him in September, 1849, at Monterey, during the sitting of the Convention, and had several friendly interviews with him. In one of these he said to me very frankly: 'Burnett, you may be correct in your views in regard to the legal right of the people of California to form a provisional government. I am no lawyer, but only a soldier, and I know how to obey orders; and when my superior officer commands me to do a thing, I am going to do it.' There was no occasion to argue against that conclusion; and, had there been such an occasion, it would have been idle to contest the determination of that honest and brave old man."[1]

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[1] Hittell, *History of California*, ii, 716 *et seq.*

[2] Burnett, 325 *et seq.*

II. FORMATION OF THE STATE GOVERNMENT

The elections were held on the appointed day, August 1, 1849, and by September 3 the delegates were ready to organize. The sessions were held at Monterey, in Colton Hall, a stone building erected by Alcalde Colton, with the help of convict labor, and used for school purposes. The convention organized by electing K. H. Dimmick chairman and Wm. G. Marcy secretary, both of whom were natives of New York. In transmitting the certified list of delegates Secretary Halleck recommended the admission of certain additional delegates whose names were inclosed. The number of those who actually participated in the work of the convention was forty-eight. Of these six were natives of California; the rest had come from different parts of the United States, New York being represented by nine, and a few from foreign countries. In the final organization Dr. Robert Semple was made president. Among the prominent members were H. W. Halleck, still serving as secretary of state under Governor Riley, and Thomas O. Larkin, a native of Massachusetts who had gone to California in 1832, had been our first and last consul there, and was at one time supposed to be the richest man in America. Several others were then, or afterwards became, prominent in the affairs of California.

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[1] Burnett, 333 *et seq.*

From the foregoing it may be surmised that the convention was not lacking in ability, despite the conditions under which it had been brought together. Its work was done rapidly but reasonably well because of the "slavish copying" of the constitutions of New York and Iowa. No objection was raised by the southern delegates to the exclusion of slavery, but the debate waxed warm over the settlement of the boundary, in which the question of slavery was involved. The insinuation raised in some quarters that the convention was awed or influenced by Governor Riley was denied by the first Senators and Representatives as an unjust assault upon the character of the members and upon the fame and integrity of the governor.[1] Mr. King also denied that he had any secret instructions from the President, or any one, to influence the people of California on the subject of slavery, and declared that they would bear witness that he had not sought to influence them.[2]

The schedule attached to the constitution provided that all laws in force at the time of the adoption of the constitution and not inconsistent therewith should continue until altered by the legislature, and that the legislature should provide for the removal of all pending causes to courts created by itself. The executive of the existing government was requested to submit the constitution to the people for ratification or rejection on November 13. At the same time state officers and two members of Congress were to be elected. If the constitution should be ratified, the legislature was to meet and the state officers were to be installed December 15, or as soon thereafter as practicable. The constitution was signed October 13, after which, says Bancroft, the members drew a sigh of relief and voted to have a ball.[1]

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[1] H. Misc. Doc., 31 C. 1 S., no. 44, p. 14.

[2] H. Ex. Doc., *ibid.*, no. 59, p. 5.

Meantime Governor Riley continued to administer the government as before. Indeed, he appears to have looked after it more carefully than before the assembling of the convention. Many officers were appointed, such as judges of the first instance, district attorneys, prefects, and notaries public, and plaintiffs were now directed to lay their grievances before the proper tribunals, instead of the governor, with the full assurance that justice would ultimately be done. The governor probably had some fears now that the remainder of the "civil fund" would not be turned over to the new state and began to administer it with a free hand, giving several large sums to municipalities for the erection of jails. This policy of administrative activity was followed up by Governor Riley to the very end of his term, so that by the time he surrendered the reins of power the new administration found a more or less organized system already in existence, though much creative and adjusting work still had to be done.[2]

In accordance with the wish of the convention, Governor Riley issued a proclamation, October 12, submitting the constitution to the people for ratification or rejection. While expressing strong doubts as to the legality of putting the new government into operation before it was passed upon by Congress, he declared that he would, at the appointed time, cheerfully surrender his powers to whomsoever the people designated as his successor, unless otherwise ordered from Washington.[1] December 12, Governor Riley announced that the constitution had been ratified by an almost unanimous vote, in consequence of which he declared the constitution of California ordained and established. In regard to this election the memorial of the Senators and Representatives to Congress said: "No attempt was made to mislead or control public opinion in relation to the constitution. . . . The truth is, that no political result in the history of any nation is more surely the honest expression of a public opinion founded in reason, reflection, and deliberate judgment than the ratification afforded by the people of California to their constitution."

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[1] Bancroft, vi, 284-304; H. Doc., no. 17, pp. 822, 861 *et seq.*

[2] H. Doc., no. 52, pp. 18-40.

The legislature met about the middle of December. On the twentieth Governor Riley yielded his authority to the Hon. Peter H. Burnett, who had been elected governor, and was installed on that day. In announcing this fact Governor Riley said:

> A new executive having been elected and installed into office, in accordance with the provisions of the constitution of the State, the undersigned hereby resigns his power as governor of California. In thus dissolving his official connection with the people of this country, he would tender to them his most heartfelt thanks for the many kind attentions, and for the uniform support which they have given to the measures of his administration. The principal object of all his wishes is now accomplished—the people have a government of their own choice; one which, under the favor of Divine Providence, will secure

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[1] H. Doc., no. 17, pp. 819, 861.

their own prosperity and happiness, and the permanence of the new state.[1]

Thus the "anomalous" government which had administered the affairs of California for several years was succeeded by another hardly less anomalous. For, though a so-called state government was now in operation, California was not admitted to the Union until September 9, 1850.

This solution of the difficulty was quietly acquiesced in at Washington. To General Riley's letter (October 1, 1849) announcing his intention to yield to the new state government Secretary Crawford replied (November 28): "As the arrangements contemplated by you may already have been made, any instructions from this department contrary to your views on the subject might militate against the peace and quiet of the community and be productive of evil. The first consideration is a due observation of law and order; and this, it is hoped and believed, will be attained under the new state of things. It is not doubted that Congress will either recognize the constitution which it is supposed the people of California have formed and adopted or provide a territorial government for them. In either event the officers of the army will be relieved of the necessity of participating in civil matters, so inconsistent with their appropriate public duties, and under circumstances so embarrassing, by the absence of legislative authority to guide and control." [2]

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[1] H. Doc., no. 52, p. 40.

[2] H. Doc., no. 18, p. 265.

BOOK III

ALASKA AND OUR INSULAR POSSESSIONS

CHAPTER I

ALASKA

THE treaty by which Alaska was acquired from Russia was proclaimed June 20, 1867. Article III stipulated that such of the inhabitants as preferred to remain in Alaska, with the exception of uncivilized tribes, should be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States and protected in the free enjoyment of their liberty, property, and religion.[1]

The reader will at once notice that this treaty, while promising citizenship, differed from previous treaties of cession in making no promise of incorporation into the Union. The writer knows of no reason given at the time for this deviation, but supposes that everybody thought that the fitness of Alaska for statehood was a possibility too remote for consideration.

The country was soon taken possession of by a small contingent of the army and a few treasury officials were sent out to enforce the United States customs laws, which were extended by act of Congress in July, 1868.[2] The internal revenue laws were not extended till later. It would hardly be correct to say that a government of any kind was established. So much as existed for some time was paternalistic, presumably with beneficent intentions. One of the commandants acknowledged himself unable to characterize it, and recommended that either a military or a civil government be established with power and responsibility somewhere. It was not republican in the opinion of a recent attorney-general.[1] There was no need of an elaborate political system, for the civilized and half-civilized inhabitants were few in number, about 2,000, besides 2,500 Aleuts, a child-like people whom our courts have since held to be citizens.

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[1] Treaties and Conventions (U. S.), 742.

[2] See Reports of War and Treasury Departments, 1868. Also *Atlantic Monthly*, November, 1898.

Nobody in Washington knew or appeared to care much about Alaska, and things went on in this way for some time. Occasionally Congress enacted or extended a law. In December, 1872, by Executive order, Alaska was added to the internal revenue district of Oregon, after which the Secretary of the Treasury became its virtual ruler, if he was not already such before. The President, it is true, had a more direct representative there, a governor, but his duties were many and his powers were few. Trading companies and even individuals shared in governmental power, especially over half-civilized and wild tribes.

Twenty-five years of such rule resulted in the practical extinction of some of the fur-bearing animals, a great decrease in the number of others, and the impending extinction of some of the native inhabitants. But the discovery of gold and the consequent rush to the Klondike gave a new aspect to the situation. As a somewhat tardy recognition of this fact Congress passed the Civil Code Bill for Alaska, June 6, 1900, and gave it a territorial government.

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[1] J. W. Griggs, Argument in Goetze *vs.* U. S. (Sup. Court), 1900-1901, p. 128.

CHAPTER II

THE ANNEXATION AND GOVERNMENT OF HAWAII

JULY 7, 1898, the President signed a joint resolution of Congress for the annexation of Hawaii. This resolution directed the appointment of five commissioners, two of whom should be citizens of Hawaii, to devise a form of government. Meantime the existing government was to continue under the direction of the President, pending the action of Congress. The officers of this government were to be subject to removal by the President. The treaties of the United States replaced those of Hawaii, but the Hawaiian customs laws were retained.[1]

During the administration of President Harrison a treaty was negotiated with Hawaii which contemplated its incorporation as a territory, with every prospect of ultimate statehood. It is worthy of note that no such promise was held out in the joint resolution. It may be that men were even then thinking that territory "appurtenant to" the United States could be held otherwise. These islands were held and governed according to the resolution for more than two years. April 30, 1900, a bill became law giving them a territorial government with the right to send a delegate to Congress. December 3, 1900, this government was inaugurated with Mr. Dole as governor.

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[1] *Current History*, viii, 319.

CHAPTER III

THE PHILIPPINES, PORTO RICO, AND SAMOA

I. The Occupation of the Philippines

On the 20th of April, 1898, President McKinley signed a resolution of Congress which authorized him to demand the withdrawal of Spanish authority from Cuba and to use the army and navy in effecting this result. As a consequence war followed the next day. Public attention was now almost wholly directed toward Cuba, but soon the country was startled to learn that on May 1 Commodore Dewey had destroyed the Spanish fleet in Manila Bay. Preparations were at once made in Washington to send an army to the Philippines and instructions were drawn up (May 19) for the guidance of the occupants.

These instructions announced the severance of former political relations and the substitution of the military power of the United States, which was declared to be absolute and supreme, and to which obedience was now due. Municipal laws relating to private rights of persons, to property, and to the punishment of crime were to continue in force, so far as compatible with the new order of things. These laws were to be administered by the ordinary tribunals substantially as they were before the occupation, but under the supervision of the American commander, provided the judges and other officers would "accept the authority of the United States." Native officials would be expelled and the freedom of the people to pursue their accustomed occupations abridged only in case of necessity. But the commanding general must be guided by his judgment, his experience, and a high sense of justice, and he must pursue a course different from that outlined above, should the conduct of the people render it necessary. All public funds and securities belonging to the government in its own right were declared to belong of right to the occupant. The real property of the state he might hold and administer, enjoying the revenues thereof. Private property was to be respected. It was further declared to be the right of a conqueror to levy contributions upon such seaports, towns, or provinces of the enemy as might be in his military possession by conquest, and to apply the proceeds thereof to defray the expenses of the war, including those of administering the civil government of the conquered territory, the right to be exercised in such a way as not to savor of confiscation. All ports and places in the actual possession of our forces were to be open to the commerce of all neutral nations, as well as our own, upon the payment of the prescribed rates of duty.[1]

In the latter part of June the first troops reached Manila, and these were soon joined by a second expedition. July 26, Major General Wesley Merritt arrived with a third and assumed chief command. August 13 the city of Manila capitulated and was occupied by the American troops. On the 29th Major General Elwel S. Otis relieved General Merritt and became, by virtue of his rank, military governor of the Philippine Islands, which position he held until May 5, 1900. He was relieved by Major General Arthur MacArthur, who was in turn replaced by Major General Adna R. Chaffee, July 4, 1901.

The first problem of importance to present itself was the question of joint occupation and participation in the control of municipal affairs with the insurgent forces, led by Aguinaldo, who had rebelled against Spain. This, pursuant to instructions from Washington, was promptly settled in the negative.[1]

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[1] Richardson, *Messages and Papers of the Presidents*, x, 208 *et seq.*

General Merritt then appointed General MacArthur provost-marshal-general of the city and instructed him to relieve the civil governor of his functions, retaining his subordinates until it should be necessary to replace them. Colonel C. A. Whittier was appointed collector of customs and soon after was given charge of all fiscal matters. A proclamation made the promises and announcements of policy outlined in the President's instructions.[2]

In the latter part of the year an attempt was made, at the request of certain of its citizens, to occupy Iloilo, when it was abandoned by the Spanish, but the attempt was thwarted for some time by the action of the insurgents. While waiting in the harbor there General Miller received President McKinley's instructions of December 21. This letter assumed that by the reduction of Manila the conquest of the islands and the suspension of Spanish sovereignty therein had been practically effected and that by the treaty of Paris, signed December 10, the future control of said islands was ceded to the United States. In view of this the military government must be extended to the whole territory as soon as possible. In doing this the beneficent intentions of the United States must be proclaimed. While the military government was supreme until Congress should act, the municipal laws would remain and be administered as before, so far as practicable.[3]

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[1] Richardson, *Messages and Papers of the Presidents*, x, 217.

[2] Report of War Department, 1899, vol. i, pt. 4, pp. 11 *et seq.*

[3] *Ibid.*, 355 *et seq.*

The letter thus epitomized was issued as a proclamation at Iloilo January 3, 1899, by General Miller, and was received with derision. Before issuing it at Manila (January 4) General Otis amended it, leaving out such words as "sovereignty," "protection," *etc.*, as likely to suggest a renewal of conditions which existed under Spain. General Otis reports that the better classes of the natives received it with satisfaction as the first authoritative declaration of the attitude and policy of the United States, the policy being one which they thought best for the interest of the Filipinos, who were incapable of self-government. But the amended edition also was bitterly attacked, and Aguinaldo met it with a counter-proclamation protesting against the claim of the United States to sovereignty over a people who had wrested it from Spain by their own blood and treasure.[1]

But the authorities at Washington seem to have acted on the assumption that the sovereignty of the United States attached to the whole Philippine Archipelago upon the capture of Manila.[2] As early as December 4, before the treaty had been signed, President McKinley assumed that the islands would be ceded and asked for the advice of Dewey and Otis regarding the force and equipment necessary to hold and govern them, a work likely to devolve upon the army and navy for some time. We have just seen that soon after the signing of the treaty instructions were given (December 21) for the occupation and government of the entire group, although, according to the treaty, Spain was not to begin evacuation until the ratifications had been exchanged. January 20, 1899, President McKinley addressed a letter to the Secretary of State intended as a guide for the civil commission appointed a few days before to assist in the peaceful extension of American authority and the establishment of civil government. This letter acknowledged that the treaty had not been ratified, but expressed the belief that it would be by the arrival of the commission at Manila. The commission, consisting of three distinguished civilians and two military men, were informed that the temporary military government provided in the instructions of December 21 would continue until Congress should otherwise determine. Without interfering with this they were to study existing conditions, report upon them to the Secretary of State, and make such recommendations as they should see fit.[1]

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[1] Report of War Department, 1899, vol. i, pt. 4, pp. 66 *et seq.*

[2] Magoon, *Reports on Law of Civil Government in Territory Subject to Military Occupation*, 247.

General Otis, however, not yet having received any such instructions, appears to have thought that the strict legal rights of the United States were not so great. Under date of January 16, 1899, he wrote to General Miller: "Until the ratification of the treaty of peace the United States has not the legal right to occupy the port of Iloilo, except by the consent of Spain. Spanish authority over the southern islands of the Philippines remains intact until the treaty is ratified. . . . [The action of Spain in withdrawing from Iloilo], viewed in the mildest light, was that of simple abandonment, for which she is responsible. . . . Spain, under a strict interpretation of international law, has still the right to enter that port and collect duties until that right is terminated by treaty ratification."[2] The last day of the month he wrote that it was inexpedient to enter upon any course which might embarrass the United States, should the treaty fail of ratification. While it is not certain that the President believed that our legal rights extended to the forcible assumption of control in abandoned places, the assumption of the attachment of sovereignty with the fall of Manila would seem to indicate such a construction of international law. If this be so, policy alone could have dictated his order not to use forcible means for collecting duties at Iloilo.[1]

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[1] (First) *Report Philippine Commission*, i, 185.

[2] Report War Department, 1899, vol. i, pt. 4, p. 86.

But the insurgents precipitated hostilities and Iloilo was captured February 11. A conference between General Miller and several of the more prominent citizens resulted in a committee of the latter going to Manila to report conditions and solicit aid. The troops asked for as protection against the Tagalos and the robber bands of the mountains were sent and Colonel J. F. Smith was detailed as military governor. A convention of delegates chosen by the people was then held (May 21) at Bacalod, where, after two months of deliberation under the protection of Colonel Smith, a constitution was prepared for submission to the President of the United States. This curious document scarcely disguised its acknowledgment of a military despotism, while attempting to provide for a *quasi* civil government.[2]

With the exchange of ratifications of the treaty of peace all such questions of right passed away, and further occupation was only a question of extending our influence by peaceable means where no resistance was encountered, or of overcoming resistance where offered by the Filipino insurgents. One case is deserving of notice, if for no other reason, because of the novel situation in which the United States were placed.

It seems to have been doubtful just what rights the United States acquired in the Sulu Archipelago, the rights of Spain there not being clearly defined nor vigorously exercised. The Sultan of Sulu ruled by divine right of the Mohammedan sort, and was supported or opposed by his datos or feudal lords as they saw fit. The social fabric was built upon a system of peonage or serfdom, and a dato's clan or following submitted to his arbitrary will without protest. In letters dated July 3 and 11, General Otis instructed General Bates how to deal with this great vassal of the United States. In general the relations formerly existing between the Sultan and Spain were to be adopted and continued.[1] August 20, 1899, a treaty was signed which became the subject of attack, both serious and comic, in the United States. By this treaty the Sultan acknowledged the sovereignty of the United States over the whole archipelago of Jolo and agreed to allow the flying of the stars and stripes. But his "rights and dignities" were to be respected, the lands immediately about the residence of his highness were not to be encroached upon, except in case of military necessity, and all religious customs were to be respected. Any slave should have the right to purchase his freedom by paying to his master the usual market price. The trade of the Sultan and his people with the Philippines, when conducted under the American flag, should be free. Moros should be tried by the Sultan's government for all crimes against Moros, but all other cases should be disposed of by the United States authorities. Full protection against foreigners was promised to the Sultan, nor would the United States sell any of the islands without his consent. The last article provided a schedule of salaries for the Sultan and his datos.[2]

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[1] Report of War Department, 1899, vol. i, pt. 4, p. 87.

[2] *Ibid.*, 123 *et seq.*

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[1] Report of War Department, 1899, i, pt. 4, 154 *et seq.*

[2] *Current History*, ix, 819 *et seq.;* Report War Department, 1899, i, pt. 4, pp. 152 *et seq.*

This agreement was approved by President McKinley, with the reservation that it should never be construed to give the consent of the United States to the existence of slavery or polygamy in the Sulu Archipelago. It was also transmitted to Congress "for its information and action," but was not submitted to the Senate as a treaty. No action upon it was ever taken by Congress. It was continued as a sort of *modus vivendi* until March 2, 1904, when it was abrogated by order of the President because the Sultan and his datos had "failed to discharge the duties and fulfill the conditions imposed upon them," and thus had "forfeited all right to the annuities therein stipulated to be paid to them." They were informed that "as residents of the Moro Province they are subject to the laws enacted therein under the sovereignty of the United States."

II. Military Rule in the Philippines

The Executive order of May 19, 1898, directed the military occupant at Manila to take charge of the customs and the public revenues, the proceeds of which were to be used in defraying the expenses of government and of the army. Another order (July 12) gave out a copy of the Spanish customs laws as revised by the Secretary of the Treasury and directed their enforcement at Manila, but before they were received General Merritt had proclaimed the old Spanish laws. The Secretary's revision, not being considered suited to existing conditions, was not enforced. The War Department then sent out an expert on revenue matters, Captain J. S. Evans, and the result of his study was the proclamation of the Spanish laws of January 7, 1891, which were put in force November 10, 1898, and so continued until the latter part of the following year. Of course the laws were so altered as to treat Spanish goods as foreign. In the summer of 1900, by direction of the War Department, a board was convened at Manila to revise this tariff. It performed this task under directions from Washington, at the same time hearing complaints and suggestions from natives and residents. The revised tariff proposed by them made no avowed discrimination in favor of American goods, which were treated as foreign.[1] In the course of the year 1901 the Philippine Commission prepared a new tariff, which, after being slightly amended by the War Department, went into effect November 15, and was made a law of Congress by act of March 8, 1902. The revised tariffs, as well as the old Spanish tariff first put in force, provided for an export duty, a tax which the Constitution forbids Congress to levy on goods exported from any State.

The right of the Executive to impose these regulations in general and the export duty in particular was defended in the Bureau of Insular Affairs on the following grounds: The discretionary war power of the President, by which the tariffs were imposed, is not subject to judicial control, nor to domestic laws and the Constitution. The insurrection made the Philippines hostile territory. Congress may participate in such power, but until they act the right belongs to the Executive. His action has since been confirmed by the Spooner Amendment (March 2, 1901). As for export duties, they may be levied on goods passing from a State by the concurrent action of the State and Congress. In the territories the national government may exercise the powers of both State and Federal governments. Mexican and Civil War precedents can be cited for the levy of taxes to control trade with insurgents.[2]

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[1] Magoon, *op. cit.*, 217; Report War Department, 1899, i, pt. 4, p. 313; *ibid.*, 1900, i, pt. 10, pp. 79 *et seq.*

[2] Magoon, 210 *et seq.*

The insurgents also took a hand in customs affairs, levying heavy tariffs, especially on exports, in such ports as were in their possession. In defiance of the protest of General Miller, who controlled the harbor at Iloilo, trade was carried on with the insurgents there and duties amounting to $15,200 were paid to them, thus enabling them to secure food and arms.[1]

While the right to make trade regulations was an incident of the right to levy customs duties, their enforcement sometimes presented troublesome questions. When the port of Manila was thrown open merchants clamored for the renewal of inter-island trade. This the Americans were powerless to give, as Spain still held nominal possession of all ports except Manila. Through negotiations with the Spanish general, Rios, arrangements were effected whereby vessels flying either the Spanish or the American flag might engage in the trade. Fictitious sales by the Spanish to save their vessels from capture by the insurgents were winked at by the Americans. Inter-island trade, being free, naturally was forbidden to all except Spaniards, natives, and Americans during the war, and after that to all except natives and Americans.

The right to regulate trade, even to the extent of forbidding it under the circumstances then existing, seems a matter too well established to be questioned, yet the owners of a British vessel, the "Will of the Wisp," lodged a complaint at the State Department because forbidden (May, 1899) to trade with the Sulu Islands, contrary, it was said, to the protocols of March 11, 1877, and March 7, 1885, agreed to by Great Britain, Germany, and Spain, which made such trade free to British ships. Damages to the amount of $10,000 were demanded.

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[1] Report War Department, 1899, i, pt. 4, pp. 45, 85.

The matter was referred to the War Department, which cited the well-known rule that treaties of commerce do not attach to the soil upon a change of sovereignty.[1] In the summer of the following year (1900) the German ambassador lodged a similar complaint because of the continuance of the restrictions and declared that the contention that the protocols ceased with the change of sovereignty was untenable. He further contended that Spain had never acquired sovereignty, or at least had never secured recognition of it over the Sulu Archipelago, hence the United States had not acquired complete sovereignty from her. He also said that the restrictions were contrary to the announced open-door policy. This, too, was referred to Secretary Root, who held that military necessity dictated the trade regulations and that they did not indicate anything regarding the permanent tariff policy of the United States in those islands, or the position of the government concerning the treaties referred to.[2]

The coastwise trade of the islands and of the interior ports was not opened until December 21, 1899.[3] In spite of watchfulness on the part of the military occupants, smuggling and illicit trade of a varied character were carried on, and men of every nationality, including Americans, seemed to be engaged in questionable enterprises promising individual gain or help to the insurgents. Heavy punishments were meted out when offenders were detected.[4]

The capture of the colonial treasury brought up questions of local and general import. Much annoyance was caused by the application of individuals for the return of money, bonds, or securities held by the former Spanish government for various purposes, some, it was claimed, on special deposit. But the funds in the treasury had been so mixed as to make segregation almost impossible, and General Otis held that the applicants appeared to have claims against the Spanish government, but none against the United States, as all funds in the treasury were surrendered as public funds. Whatever the source or nature of these funds, title to them was now vested in the United States by capture, and international law did not require return of funds to individuals who had claims against the government from which they were captured. But when special deposits were recognized they were returned.[1] This position was substantially approved by the War Department.[2]

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[1] Magoon, 302 *et seq.*

[2] *Ibid.*, 338.

[3] Report War Department, 1900, i, pt. 10, p. 46.

[4] *Ibid.*, 1899, pt. 4, pp. 53, 160.

Although General Otis claimed the captured funds as the property of the United States, he placed them in charge of the "insular treasurer," an official of the military government, and, in order to meet the demands of trade, ordered him to exchange $600 of Spanish copper coins per week for local currency at par. The Philippine Commission formulated an act repealing this order and authorizing sale to the highest bidder. Governor Taft, however, had doubts as to the legality of the matter, and, in view of objections raised by General MacArthur, then in command, referred the question to the Secretary of War. The decision of that officer was that captured property belonged to the United States and could be disposed of neither by a general nor a civil government under his direction, but only by Congress.[3]

This indicates that a distinction is made between funds captured at the time of occupation and those secured through administering the enemy's revenue, for text-writers on international law hold that the latter belong primarily to the civil (military) government, and they have been used by the United States in two wars to support such governments and to meet the expenses of war. Accounts have been rendered to the War Department instead of to the Treasury.

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[1] Report War Department, 1900, i, pt. 10, 37 *et seq.*

[2] Magoon, 624.

[3] *Ibid.*, 621.

Another troublesome problem arose out of the application of several individuals for the return of their estates, which had been "embargoed" by the Spanish authorities upon charges of treason. General Otis held (November 25, 1898) that the United States military occupation was of a temporary character and did not place upon the occupant any obligation to redress or even inquire into grievances alleged to have been imposed by Spain, especially if only property rights were affected. That the United States would not be justified in setting aside the laws of Spain and the decision of her courts where individual property rights alone were affected, nor even the war decrees of Spain promulgated to punish her refractory subjects; that the relief asked for was civil in its nature and should be sought in the civil courts of the conquered territory, which had been continued; that the case involved a question of United States revenue, since the petitioners, as Spanish subjects, asked for the return to them of the public property of Spain, the usufruct of which now belonged to the United States. For the continuance of the embargo depended upon pardon or trial. Until such action had been taken the use of the embargoed property belonged formerly to Spain, now to the United States. Finally, the temporary occupant would be recreant to his trust should he knowingly divert, without just cause, properties the use of which would again inure to Spain upon the restoration of her sovereignty. Permanent possession by the United States would present the question in a new light.[1]

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[1] Report War Department, 1899, i, pt. 4, pp. 38 *et seq.*

In the administration of the colonial treasury there was for a time a dual occupation of this office, the Spanish officials dealing with such fiscal matters as pertained to the parts still held by them, which did not owe obedience to the United States. But this arrangement proved unsatisfactory and was soon abandoned.[1]

The character of the revenue to which the United States were entitled demanded immediate attention. It was early decided that they could not collect taxes imposed for service in any other part of the world. The railway tax, being a provincial tax, could not rightfully be collected while only Manila was held. A certificate of identification, called *cédula personal*, was required of every resident of the islands "without distinction of race, nationality, or sex, over eighteen years of age," except that the Chinese were put in a class by themselves. For issuing this certificate, which also served as passport, a fee was charged. This tax was discontinued as too oppressive and because the certificates were worthless beyond the American lines. Later, however, at the request of the inhabitants, it was revived and the certificates were issued for a sum sufficient to cover the cost. The special Chinese *cédula* was suspended. No attempt was made to collect any revenue from licensed gambling and from such contracts as the United States courts would hold void on grounds of public policy.[2]

Only a few words can be devoted here to the character of the revenue laws and the work of their administration. It was the policy of the authorities to support the Insular Government as far as possible by the revenue from customs and to expend the internal taxes for matters of local interest. This was an innovation on the Spanish rule, under which all taxes collected were sent to Manila. Only about thirty per cent. of the Spanish revenue was derived from the customs, but this deficit was not made up by raising the rate. The administration of the customs before the transfer had been very imperfect. There were many exemptions. and collusions between the officers and importers resulted in great losses every year. The principle of taxation was to load the necessities and put only a light burden on luxuries. The Americans reversed this whole policy and made an effort to give an honest administration. The following figures show the contrast in results: In 1894, the best year of Spanish domination, the customs yielded about $2,352,000 in gold. In 1899 the Americans made the same tariff, after important reductions, yield about $4,400,000.

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[1] Report War Department, 1899, i, pt. 4, 31, 281 *et seq.*

[2] *Ibid.*, 31, 159, 297.

The public revenue was collected in the currency of the country, which was upon a silver basis. One officer thought it somewhat inconsistent for American officials in what he styled American custom-houses to refuse payment in American gold. The greatest hardship arising from this policy appears to have fallen upon the men of the army who were paid in gold, which, for some time, they had to exchange at less than its real value.[1] In legislating upon this subject Congress have not yet seen fit to introduce the gold standard. During the continuance of the war the revenue collected was sometimes expended for purposes other than the support of the so-called civil government. It was even used to help in prosecuting the war, one item of expense being for the subsistence of Spanish prisoners of war.[2]

On the day following the fall of Manila a proclamation ordered the continuance of the municipal laws and their administration substantially as before the surrender, but "by officers appointed by the government of occupation." The intention was to suspend the courts until they were reorganized, but it was not so understood by all. Some of the Spanish officials sailed for Spain without giving any notice of their intention to depart, or taking proper care of the records of their offices, some of which could never be found; but in a few instances the courts were reopened and attempts were made to settle cases in litigation at the time of the surrender. This action caused indignant protests from both natives and foreigners and brought forth an order to close all such courts. Several conferences then followed between these officials and the military governor, the result of which was that the old officials were allowed to resume in civil affairs only such jurisdiction as was conferred by the Spanish laws. They were explicitly forbidden to exercise criminal jurisdiction. This condition was not satisfactory to the Spanish judges and their courts were gradually abandoned, after which citizens had to resort to the military governor or the provost courts for legal processes in their business or do without them. But the provost courts were deemed insufficient, as the inhabitants needed processes of a strictly civil nature. Because of this the military governor held conferences with Judge Arellano, a leading Filipino lawyer, late secretary of state in Aguinaldo's cabinet, which resulted in the codification of the Spanish laws by the judge and the reorganization of the judiciary. Following the judge's advice General Otis appointed both natives and Americans (army officers) to the bench. As our lines were extended and order was restored inferior courts were organized with native officials. This was done through general orders issued by the military governor. In large cities, however, where there was likely to be litigation between foreigners or Americans and Filipinos, American judges were usually appointed in order to save the necessity for a so-called United States court to which Americans and foreigners might resort.[1]

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[1] Report War Department, 1899, i, pt. 4, 161.

[2] *Ibid.*, 131, 160, 281.

Since the existing courts were deprived of criminal jurisdiction, a tribunal to administer the criminal law had to be provided and it was found in that all-powerful engine of justice (or injustice) invented during the Mexican War and carried to perfection in the Civil War and Reconstruction days, the military commission. Provost courts also assisted in this branch of justice. The civil courts appear to have been allowed to resume a part of their criminal jurisdiction, but the military commission was continued. In defining its sphere of action General Otis said:

> The local courts shall not exercise jurisdiction over any crime or offense committed by any person belonging to [or connected with] the Army of the United States, . . . or upon the same by any inhabitant or temporary resident of this territory. In such cases, except when courts-martial have cognizance, jurisdiction to try and punish is vested in military commissions and provost courts. . . . For the purpose of providing for the prompt punishment of crime in cases where the civil courts may fail, from whatever cause, the military commissions and provost courts will . . . . be vested with jurisdiction concurrent with the civil courts to hear and determine all crimes and offenses committed by inhabitants or temporary residents within the United States occupation . . . . In all sentences imposed by military commissions and provost courts the punishments awarded shall conform, as far as practicable, in character and degree to the laws of the United States, or of either (*sic*) of the States, or to the customs of war.[2]

These engines of justice do not seem to have been idle.

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[1] Report War Department, 1899, i, pt. 4, 12, 36, 145 *et seq.; ibid.*, 1900, i, pt. 10, pp. 156 *et seq.; Outlook*, May 31, 1902, p. 308.

[2] Report War Department, 1899, i, pt. 4, p. 58.

Some time after the occupation of Manila, two Spanish officials who had been continued in charge of the larger city prisons were convicted of "embezzlement in violation of the laws of war." A Spanish editor was fined and imprisoned for "publishing news and circulating seditious newspaper articles in violation of the laws of war." The provost courts disposed of a great many cases. During the second year of the occupation an inferior provost court was organized in Manila and it alone tried 5,982 cases. The first year larceny and theft were the leading charges; during the second, smuggling, of which there were only four cases the first year, came to the front.[1]

The provost-marshal-general had charge of many matters not pertaining to the judiciary. Indeed, he appears to have been the general head of municipal government, having control of no less than sixteen departments. One of these was that of public instruction, and it is worthy of notice that the schools were reopened in about two months after the occupation. March 30, 1900, the department of public instruction for the Philippine Islands was created and Captain Albert Todd was put in charge.[2]

Under Executive orders from Washington a postal system was organized and the Spanish office of patents and copyrights was taken in charge and properly reorganized.

Owing to the growing density and floating character of the population of Manila it was thought advisable to defer the reorganization of the municipal government there on civil lines. Other towns, however, were given local government under military supervision, and the sphere of activity for town councils was defined by general order.[3] This work was continued by the Philippine Commission under a reasonably liberal policy.

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[1] Report War Department, 1899, i, pt. 4, 52 *et seq.*; *ibid.*, 1900, pt. 10, p. 282.

[2] *Ibid.*, 220 *et seq.*

[3] *Ibid.*, 1899, pt. 4, p. 143 *et seq.*

For nearly two years a London firm pressed through diplomatic channels a claim for damages growing out of the failure of the municipality of Manila to keep an alleged contract. Damages were wanted from any source obtainable, the municipality, the insular military government, or the United States. The matter was referred to Secretary Root, who decided that the municipal officers installed by the military governor were as competent to bind the municipality as their predecessors, and that if their action in this instance created a liability which would attach to the city under ordinary conditions, the liability attached under the extraordinary conditions then existing. The municipality, however, denied the existence of a contract and the London firm, seeing no hope of redress there, pressed their claim against the United States as ultimately responsible, the failure to keep the alleged contract being due to an order of the military governor. The secretary then held that the claim was one against the United States for unliquidated damages, which, the claimants being foreigners, he could not even transmit to Congress, the State Department being the proper channel for that.[1]

May 11, 1899, the War Department issued a circular (No. 16) directing collectors of customs in ports under military government to perform the duties formerly belonging to United States consuls or consular officers in such territory, so far as concerned seamen, vessels, clearances, *etc.* This course was necessary for purposes of commerce, and the action of collectors in this capacity was acquiesced in by customs officers of the United States and of other nations. The death at Iloilo of a citizen of the United

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[1] Magoon, 407 *et seq.*

States brought up the question of the powers of these consuls and of what government they represented. The commandant of Iloilo, in a note addressed to the collector, said: "You are directed, in your capacity as United States consular agent, to take charge of the estate of the late Mortimer Cook and dispose of the same in accordance with United States laws and consular regulations." But when the collector made his report on the estate to the State Department, the usual channel of consular communication, the Secretary referred the matter to the War Department, with the remark that "as the Philippines have been taken possession of by the United States and are now under the control of the War Department, there can be no longer either actual or acting consular officers in these islands and that no reports can properly be made to this Department." The Secretary of War then acted as a private person and turned the property over to the heirs of the deceased.[1] The collectors continued to perform the consular duties indicated in the order of May 11, but in so doing they were representatives of the insular military government, and not of the United States.

Throughout his administration, especially after the beginning of hostilities with the insurgents, General Otis maintained a very rigid censorship of the press and of press dispatches. This was, perhaps, the cause of the loudest complaint against him in America.

In the progress of hostilities with the insurgents a question arose as to the power to punish for treason. The War Department held that, if it was intended to punish for offenses of a criminal character against the Federal Government of the United States, it was necessary for Congress to define the crime, prescribe the penalty, and confer the jurisdiction to inflict such penalties. But that—citing the insurrection in New Mexico which was described at some length in a preceding chapter—if it was intended to punish for offenses against the military government of the Philippines, the legislative branch of that government might provide the necessary legislation. All the departments of the military government being considered as instruments of belligerency, its courts might be used to condemn what its cannon had captured.[1]

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[1] Magoon, 487 *et seq.*, 519 *et seq.*

In November, 1901, the Philippine Commission passed an act to define and provide for the punishment of treason, insurrection, sedition, *etc.* This act was severely criticized by some, but in reality it compares very favorably with similar legislation in the States.[2] It is questionable, however, whether the Philippine government as such had a right to define and punish crimes against the United States, as was done in this act.

Within a month after the occupation of Manila, orders were issued to apply there the United States laws controlling Chinese immigration into United States territory. This does not appear to have been done under strict military necessity, but because it was thought to be for the general good of the country. The order was subsequently confirmed by the War Department and was kept in force.[3]

After the ratification of the treaty American laws were applied with a freer hand. This was true in particular in the reorganization of the judiciary, new, that is, American, rules of procedure in the courts and for the practice of law being prescribed by general order.[4] In a letter of instructions, dated April 7, 1900, President McKinley directed the

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[1] Magoon, 264 *et seq.*

[2] *Ibid.*, 655 *et seq.*

[3] Report War Department, 1899, i, pt. 4, pp. 33 *et seq.*

[4] *Ibid.*, 1900, pt. 10, p. 159.

Philippine Commission to see that the Filipinos had full benefit of the bill of rights in the United States Constitution.[1] Some of these the Commission enacted into law, one being the right to the writ of *habeas corpus*. Not long after this law was passed General Chaffee attempted to deport a civil employee, whereupon recourse was had to the insular supreme court, which released the prisoner upon a writ of *habeas corpus*.[2] Others of the rights were extended from time to time until now practically all have been given.[3]

III. Military Rule in Porto Rico

The first proclamation of beneficent intentions toward the Porto Ricans was issued by General Nelson A. Miles, July 28, 1898. This was followed by one the next day publishing the President's instructions of May 19 in relation to military government. October 18 the military government of Porto Rico was formally set up by Major-General John R. Brooke at San Juan.

The story of our occupation and government of Porto Rico adds very little in point of principle or of practice to what was done in the Philippines, but a few things deserve particular notice.

To aid the established judiciary, military commissions were created (December 8, 1898), with powers similar to those given to like bodies in the Philippines. The special object for which they were created was to deal with bandits, who were very active in the island. Several offenders were adjudged guilty by these tribunals, and were incarcerated in the local jails. "But," says General Davis, "as the military commission is an instrumentality for the enforcement of the laws of war, the use of that means of administering justice ceased on April 11, 1899, the date of the proclamation of the President announcing the termination of hostilities with Spain."[1]

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[1] Report War Department, 1901, pt. 10, p. 8.

[2] *Current History*, xi, 596.

[3] Act of Congress, July 1, 1902.

Early in 1899, when it appeared certain that peace would be definitively proclaimed, the American officials in Porto Rico began to look about for something to take the place of military commissions. Major A. C. Sharpe, acting judge advocate of the department of Porto Rico, recommended that the President be requested to proclaim martial law wherever he should deem it necessary, in order that the military tribunals might continue to sit. The judge advocate general, however, thought this course one of doubtful legality, but intimated that the President had the power to establish a provisional court with competent jurisdiction, and cited Lincoln's provisional court in Louisiana as a precedent. In spite of the fact that this suggestion was approved by the President, General Henry, successor to General Brooke, forwarded a project for such a court to the Secretary of War with his disapproval. His successor, General Davis, however, approved the project, and the court was established by general order, June 27, 1899, and was duly installed with considerable éclat July 1.

This court was designed to meet exigencies arising in cases not properly cognizable in the local courts, such as violations of revenue laws and of statutes of the United States, and controversies between citizens of different States and between citizens of foreign nations. It was styled a United States provisional court, and the judges were clothed with the powers vested in the judges of the circuit or district courts of the United States. "The court shall," said the order establishing it, "as far as practicable, conform to the precedents and decisions of the United States courts in similar cases which have been tried and determined in territories formerly acquired from Spain or Mexico." The employment of juries was left to the discretion of the court. If any litigant was dissatisfied with a decision, a stay of execution would be granted for ninety days to allow an appeal to the United States Supreme Court. If the appeal failed or was not prosecuted, execution would then issue. The department commander might exercise the power of pardon or commutation in criminal cases. All fees, fines, and costs were to be turned over to the treasurer of the island.

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[1] Report War Department, 1899, i, pt. 6, pp. 504, 569.

During the ten months of its existence, which ceased with the installation of the civil government under Mr. Allen, this court transacted a large amount of business and is reported to have exerted a beneficial influence throughout the island. Equity, common law, and criminal cases were all brought within its jurisdiction. The death penalty was imposed in one case, but the military governor commuted this to life imprisonment. The total expense of the court was $20,455.08; the receipts from its fines and fees amounted to $6,320.49. There was also the sum of $10,000 collectable as forfeited bail. The sum of $1,215 was turned over to the Treasurer of the United States as the proceeds, less expenses, of $3,144, Mexican, captured by the troops at Mayaguez when that city was occupied. It was adjudged by the court to be good prize of war.[1] No comment is needed upon this decision beyond recalling to the reader the cases of Jecker *vs.* Montgomery and "The Grapeshot."[2]

Soon after the provisional court was instituted a conflict arose between it and one of the local courts, as both claimed jurisdiction over Spanish subjects in cases provided for in Article XI of the treaty. The local court appeared in a body before the commanding general to protest against the interference of the provisional court, though the defendants, who were charged with counterfeiting Porto Rican coins, preferred to be tried in the latter. The matter was then referred to Washington, and both courts were requested to suspend proceedings in the case pending a reply.[1] The writer made several efforts to find out definitely the grounds of the protest by the insular court, but without success. The War Department decided that the offence of counterfeiting Porto Rican coins did not lie within the jurisdiction of the provisional court, though the order establishing the court had sought to give it exclusive jurisdiction in such matters. General Davis then amended the original order according to these instructions.[2] The defendants were subsequently tried in the insular court.[3] At the same time General Davis interpreted the treaty as not intending to give Spanish subjects any special privileges, but as leaving them subject to the jurisdiction of the provisional court the same as other residents of the island.[2]

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[1] Report War Department, 1900, i, pt. 13, pp. 76 *et seq.*

[2] *Supra*, pp. 207 *et seq.*

In one case a litigant attempted to take advantage of the provision allowing appeals from the provisional court to the United States Supreme Court, but an application for leave to file a petition for a writ of *certiorari* was denied on the ground that the court was a military tribunal, and not a court with jurisdiction in law or equity, within the meaning of those terms as used in the United States.[4] Nevertheless, the existence of the tribunal was afterwards recognized by Congress, which provided, in the act creating the civil government of Porto Rico, that the United States district court established by that act should take charge of its records and assume jurisdiction of all cases pending therein.

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[1] Report, *ibid.*, 1899, i, pt. 6, pp. 594, 688 *et seq.*

[2] General Orders, No. 47, Department of Porto Rico, San Juan, March 6, 1900.

[3] Letter from Judge N. B. K. Pettingill, of the provisional court.

[4] *In re* Vidal, 179 U. S., 126.

Three distinct periods are to be noted in the military government of Porto Rico. The first extends from the landing of troops under General Miles to the cessation of hostilities on August 14, following the peace protocol of August 12; the second extends from August 14, 1898, to the proclamation of peace, April 11, 1899; the third ended with the installation of the civil government, May 1, 1900. During the first period Porto Rico was a territory of Spain occupied in part by the troops of the United States. During the second period the sovereignty of the island was still nominally in the crown of Spain, though the peace protocol contained a promise of its ultimate cession. During the third period the island was a territory belonging to the United States, for the government of which Congress had made no provision.

Soon after the occupation changes began to be made in the political and judicial system of government, some of which were not dictated by military necessity. The government was administered as though the island were a permanent possession of the United States, even before the treaty of peace had been signed, much less ratified. Indeed, one could hardly tell from reading the civil dispatches of the military governor whether there ever was a treaty. The natural inference from this would be that the sovereignty of the United States was regarded as attaching to the island with the occupation of San Juan, October 18, 1898, or possibly with the signing of the peace protocol, August 12. Such a position would be untenable in international law, and still more so according to our own law, which does not legitimize the acquisition of territory by conquest without the sanction of the treaty- or law-making power. The explanation, however, of the policy pursued during the second period probably is to be found in the fact that, as the protocol of August 12, besides pledging Spain to cede Porto Rico, required her to evacuate it immediately, it was thought to be hardly worth while to delay the Americanization of the island by standing upon the formalities of law.

A more important problem presented itself in the third period. Some writers hold that after the conclusion of peace the military occupant has no power to legislate for the territory, but can only administer the existing laws. As many of the municipal laws of Porto Rico were in conflict with the political character, institutions, and Constitution of the new sovereignty, it was no small task to decide what laws must be superseded by the existing laws of the United States upon the same subject. Even here the military governor may be embarrassed by finding that certain regulations are in conflict with our Constitution, but that the national government has no legislation upon the subject. He is then left to choose among the laws of forty-five states and a still greater number of municipalities. The first change in local law by military order was made October 27, 1898. Among other things this order contained a paragraph abolishing the stamp tax and another abolishing an administrative court.[1] As the laws imposing the tax and establishing the court can hardly be said to have been in conflict with any provision of our own Constitution or laws, the order was unwarranted, if the military governor has no constructive legislative power. The provisional court already mentioned may be cited as another example of legislative work. Many other changes of importance were made, the details of which need not be given here.

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[1] Report War Department, 1900, i, pt. 13, p. 47.

These facts are not mentioned as revealing any great turpitude in the military governors in going beyond the powers defined in certain laws. Rather they reveal the constructive ability of the American. While a great stickler for law, he is not shackled by the absence of law, nor always by an observance of its technicalities. It seems to have been the object of the military governors in Porto Rico to begin to adopt the system of local laws and administration which Congress might reasonably be expected to provide for the island. To their credit be it said that, with two slight exceptions, their military orders were confirmed by Congress and declared to be a part of the law of the land.[1]

The military governor in Porto Rico had control over all civil matters except the postal, quarantine, and marine hospital services. The first was administered by men appointed for that specific purpose by the President, but that fact does not remove it from the realm of military government. The prerogative for this, as well as for every other branch of the insular governments, had its origin in the war power. It is a notable fact that the greatest scandals of the military régime arose in connection with the postal department in Cuba, which was administered by civilians instead of army officers.[2]

As in previous cases, Congress desired to know what the army officers were getting for administering civil affairs. Their inquiry revealed the fact that several in Cuba were receiving extra pay, the military governor $7,500 and three or four subordinates smaller sums, all from the insular revenues. These payments were authorized by the President upon the oral advice of the Attorney-General that they were lawful.[1] In Porto Rico only one officer received any extra salary or allowance. This exception was in the case of an assistant surgeon, a civilian under contract with the army, who was detailed as a member of the board of education and of the board of health. As he had had considerable experience in educational matters the military governor felt that his services were worth the extra pay ($100 a month), without which they could not have been secured. He was paid from the insular funds. The military governors also "found it necessary to make some minor expenditures for meeting expenses of reception of officials," amounting in all to $475.36.[2]

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[1] Report War Department, 1900, i, pt. 13, p. 45.

[2] *Ibid.*, 27.

April 12, 1900, the Porto Rican Civil Government Bill became a law, to take effect May 1, 1900. The officers of this government were to be appointed by the President and confirmed by the Senate, but on April 30 only two or three had qualified. As officers of the army on the active list were forbidden to hold civil office under penalty of loss of commission, it was necessary to make some provision for carrying on the government. The military governor was equal to the emergency and exercised his powers of legislation and appointment on April 30 by reorganizing his military government so as to create the departments required in the act of Congress and by appointing civilians as heads of these departments. Six gentlemen thus appointed took the oath of office on April 30, and held over until their successors were duly installed. Governor Charles H. Allen was inaugurated on May 1, and the military governor published his last order that day announcing the transfer of the government to the civil authorities.[3]

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[1] H. Doc., 56 Cong. 1 Sess., no. 696, p. 16.

[2] *Ibid.*, 22.

[3] Report War Department, *ibid.*, 56 *et seq.*

The Administration has been vigorously attacked in America, both as to its policy of expansion and the method of carrying it out. Charges of mismanagement at home and of corruption and misgovernment in the islands have been freely and persistently made. Investigations have revealed some things not to be commended, but have accomplished little beyond revealing, and probably checking them. Some things have gone wrong in Porto Rico, but the loudest and most persistent complaints have been leveled against the government of the Philippines, especially the military administration under the direct supervision of the commanding general. The work of Governor Taft and the Philippine Commission has met with general commendation in most particulars, though the granting of such powers as were exercised by the Commission threw into hysterics some who were very loud in proclaiming their devotion to the Constitution. But, as stated in the Preface, and for reasons there given, no special attention will be given here to an inquiry as to the character and accomplishments of the military governments in our recent acquisitions.

IV. The Occupation and Government of Tutuila, Samoa

The first negotiations for a naval station at Pago Pago, island of Tutuila, Samoan group, date back to 1872. The right to one was acquired by treaty in 1878. The various troubles, local and international, which led to the partition of the islands do not concern us here. Suffice it to say that the partition was accomplished by a convention signed at Washington, December 2, 1899, by the representatives of Great Britain, Germany, and the United States. By this convention Great Britain renounced all her rights and claims in the Samoan group, while Germany renounced, in favor of the United States, all her rights and claims in Tutuila and other islands east of longitude 171, west of Greenwich.

Tutuila, the largest of the islands thus brought under the dominion of the United States, has an area of only fifty-four square miles, but the harbor of Pago Pago is considered one of the most valuable island harbors in the South Pacific.[1] About four thousand natives reside on Tutuila, and about one thousand five hundred on the Manua group, some seventy miles to the east. They are a branch of the Malay race and are in a very primitive stage of development, though said to be of a tractable disposition.

February 17, 1900, an order was forwarded through the Navy Department to Commander B. F. Tilley to take possession of the islands in question and to act as their governor. Pursuant to this order Captain Tilley hoisted the stars and stripes at Pago Pago, April 17, and published a proclamation of the President, dated February 16, 1900, which announced that the United States had assumed the sovereignty and protection of the islands and that they were assigned to the Navy Department for a coaling station.[2] According to the captain's account the natives gladly swore allegiance to the United States.[3]

As for government, Captain Tilley received no instructions beyond the statement that "a simple, straightforward method of administration, such as to win and hold the confidence of the people,"[4] was expected of him. The lack of a central administration was thought to be the chief cause of the constant tribal wars, and the captain, as supreme legislator and executive, first undertook to remedy this defect. Evidently he did not consider the Second Amendment to the Constitution in force in Tutuila, for he at once proceeded to disarm the natives. The ease with which they were persuaded to give up their arms, even without compensation, was cited as a proof of their child-like simplicity.[1] Subsequently these arms were paid for out of the emergency fund, by order of the President. For the purpose of instituting a systematic government the country was divided into counties and districts and these were put in charge of native officials, who were selected by the governor and elected by the people. The greatest trouble was in deciding between rival claimants among the chiefs. A general council was then held and some reforms were instituted, the natives readily following the suggestions of the commandant. The reforms were mainly social and economic, touching the questions of marriage and divorce and certain customs not conducive to economic development. In the course of the year 1901 serious charges of drunkenness and immorality were preferred against the commandant, but they do not appear to have been sustained.[2] The Secretary of the Navy then forbade the sale of "wines or other refreshments at the hotels." The commandant spoke approvingly of this order, but said it was of little use, since the natives were not addicted to liquor. The American consul at Apia, however, begged to have it rescinded on the ground that business had fallen off to such an extent as to cause the closing of the hotels.[3] Captain Tilley submitted his regulations to the Navy Department for approval, but at the end of two years no formal action had been taken upon them.[4]

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[1] *Current History*, ix, 829 *et seq.*

[2] Report Secretary of Navy, 1900, pp. 99 *et seq.*

[3] *Ibid.*, 1901, p. 85.

[4] *Independent*, Nov. 27, 1902, p. 2811.

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[1] *Independent*, July 11, 1901, p. 1602.

[2] *Current History*, xi, 596.

[3] *Ibid.*, xii, 538.

[4] *Independent*, Nov. 27, 1902, p. 2812.

The plan and policy instituted by Captain Tilley were followed by his successors in office, who had for his administration only words of praise. The first year the native officials received no salary, but each was allowed a cotton duck uniform. The next year salaries were promised and a tax was levied to meet these and other expenses. The collection of this tax, which was paid in copra, the chief product of the island, caused no little trouble to the commandant. Although the tax was recommended by the chiefs, they sometimes advised resistance to its collection, usually because of a grudge for some imagined wrong. It was also found that native judges were not always to be depended upon when it came to abolishing old customs, which, although they were deemed pernicious by the commandant, were dear to the people. Owing to this fact it became necessary to associate white judges with the natives. In one case where a native judge proved obdurate, he was sentenced to fine and dismissal. We have seen that Captain Tilley disregarded the Constitution in disarming the people, but his successor, Captain Sebree, appealed to that document to justify the abolition of an old custom which compelled a man who belonged to the London Mission Society's church and changed to any other to leave his village immediately.[1]

V. The Panama Canal Zone

By the Clayton-Bulwer treaty of 1850 the United States and Great Britain agreed that neither party should ever secure or maintain any exclusive control over the interoceanic canal, the construction of which was then in contemplation by way of Nicaragua. To this end they engaged to extend to the canal their joint protection, and also to extend the same principle to any interoceanic communications by way of Tehuantepec or Panama. Chiefly as the result of the colossal failure of the French Panama Canal Company, the attention of the United States was for many years confined to the Nicaragua route; but, in 1899, the President was authorized to appoint a new commission to investigate this route and all others deemed worthy of study. The report of this commission favored digging the canal at Panama. Meanwhile, the American people had become very restive under the restrictions of the Clayton-Bulwer treaty, and in 1901 a new treaty was signed at Washington by Mr. Hay and Lord Pauncefote, by which the United States were left untrammeled.

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[1] *Independent*, Nov. 27, 1902, p. 2821.

This treaty was followed up by an act of Congress, known as the Spooner Act, of June 28, 1902, which authorized the President to acquire for the United States the rights and property of the New Panama Canal Company, of France, and to secure from Colombia "perpetual control of a strip of land, . . . not less than six miles in width" from sea to sea, together with the right perpetually to maintain and operate the Panama Railroad. In case of failure to secure this concession from Colombia "within a reasonable time," he was directed to seek similar terms from Nicaragua for a canal through her territory.

A treaty was then concluded with the Colombian government, was duly ratified by the United States Senate, but was rejected by the Colombian congress. President Roosevelt made no overtures to Nicaragua, though there was no prospect of a change of temper on the part of Colombia. Possibly this delay was due to the fact that he knew that a revolution was brewing in Panama, and wished to see what the result would be.

The revolution came to a head November 3, 1903, and the Republic of Panama proclaimed its independence on that day. In accordance with instructions previously received from Washington, Commander Hubbard, of the gunboat "Nashville," landed fifty marines and gave the Colombian commander to understand that the United States would not allow fighting which would endanger the freedom of transit. The Colombian troops then withdrew and no serious effort was ever made to subdue the country, owing to the fact that the United States would not allow the landing of troops. November 13 our government recognized the *de facto* government of Panama by receiving its minister, M. Bunau-Varilla.

The conduct of the United States government was defended on the ground of the treaty of 1846 with New Granada, described by Secretary Hay as "a covenant which runs with the land," and of "the interests of collective civilization." It was held that we had guaranteed the sovereignty of Colombia against a foreign power, but not against her own citizens. The government at Bogota can hardly have dreamed in 1846 that it was ceding away the right to put down rebellions anywhere within its borders, but it could do nothing but confess itself helpless before a much more powerful nation and appeal to diplomacy. All diplomatic remonstrances proving futile, recourse was finally had to the courts of France in the hope of restraining the Canal Company from disposing of its property, but with no better success. The recognition of the independence of Panama by the United States was soon followed by similar action on the part of the leading European and by some of the Spanish-American states.

On November 18, 1903, Mr. Hay concluded with M. Bunau-Varilla a treaty between the United States and the Republic of Panama, ostensibly in pursuance of the provisions of the Spooner Act, which President Roosevelt construed to authorize him to treat with the power in control of the Isthmus. By this treaty the United States guarantee the independence of Panama. In return they secure in perpetuity a canal zone ten miles wide. Within the limits of this zone we also have "all the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power and authority." From this grant the cities of Colon and Panama are excepted, but the United States have the right to acquire and control property in them. A monopoly is granted in perpetuity for the construction and operation of railways or canals across the territory of the Republic. The canal is to be neutral, but we are empowered to use armed forces and to erect fortifications for its protection. In return for these concessions Panama is to receive at once the sum of $10,000,000, and $250,000 per annum at the expiration of nine years.

This treaty was duly ratified by both governments, and the ratifications were exchanged February 26, 1904. Orders were at once given that troops should be sent to the Isthmus to relieve the marines on duty there. President Roosevelt then proceeded to appoint the Canal Commission as provided for in the Spooner Act, which required that four of the seven members should be men skilled in the science of engineering, and that one of the four should be from the army and one from the navy. In the latter part of March the President called the Commission together and gave them elaborate instructions previous to their departure for Panama. May 9 he held a conference with the Secretaries of State and War and with the Attorney-General, after which he directed the Commission to report to the War Department. General George W. Davis, the army member of the Commission, was appointed governor of the American zone of the Isthmus, and was empowered to appoint one judge who should exercise judicial authority. Legislative powers have by statute been delegated to the Commission until the expiration of the Fifty-eighth Congress, provided that the laws be made and executed in accordance with the principle of the bill of rights.

VI. The Instrument of Government

The instruments of government, both in Washington and in the islands, during the war with Spain have been mentioned incidentally in the course of the narrative, but it may be well to bring them into one view.

First of all we have the President of the United States, in whom all power and responsibility centered. His orders were directed to such departments as were most intimately concerned, but practically all of them issued from the War Department. To assist in handling the ever-increasing business, especially to deal with legal questions as they arose, the Bureau of Insular Affairs, War Department, was created and the Hon. Charles E. Magoon was appointed its law officer.

In the islands the commanding general was military governor, and was clothed with executive, judicial, and legislative powers. In most cases army officers at first usually performed all the civil duties, except such as were of a purely local character, and often these also; but sometimes civilians were employed. As the army officers received no extra pay for such work the expenses of the civil administration were comparatively low. But as the provinces became more and more pacified, a larger use was made of civilians.

The first Philippine Commission, as already noted, was appointed in January, 1899. Though this was done under what is commonly known as the "war power," the Commission was directed to report through the Department of State. The work of this Commission was interfered with by the insurrection, but it made an elaborate report to the President in 1900. Subsequent reports, however, were made to the War Department. In the spring of 1900 the work of pacification had proceeded far enough to enable the Commission to enter upon administrative work, and it was ordered to return to the Philippines "to continue and perfect the work of organizing and establishing civil government already commenced by the military authorities."[1] The work of organizing local governments in the pacified districts was now confided to it. September 1, 1900, it was entrusted with legislative power, in consequence of which we now have a large volume of laws, preceding each of which is the unusual expression, *By authority of the President of the United States, be it enacted by the United States Philippine Commission.* Certain executive powers were also given to the Commission, such as that of appointing officers in various departments, but the commanding general continued to be the chief executive, subject to the laws enacted by the Commission, until July 4, 1901.

So far the President had acted untrammeled, or unaided, by any word from Congress. May 1, 1900, he was relieved of the government of Porto Rico by the organization of civil government under act of Congress. March 2, 1901, by the Spooner Amendment, Congress ratified what had already been done in the Philippines, and ordered that, until Congress should otherwise direct, the power to govern them should be vested in such persons and exercised in such manner as the President might appoint and direct.

July 4, 1901, the military yielded to civilians in the pacified districts of the Philippines, and the Hon. Wm. H. Taft, president of the Commission, was inaugurated first civil governor. One year later civil government was proclaimed for the whole Archipelago, in conformity with an act of Congress of July 1, 1902, which left its inauguration to the discretion of the President.

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[1] Magoon, 229.

If the source of the power of the President to govern be sought, it is to be found, as has frequently been pointed out, in his war powers during hostilities. Before the exchange of ratifications of the treaty with Spain, hostilities were opened by the insurgents and a domestic war took the place of a foreign one. When the latter war ended, was left for the Executive to say. In Porto Rico and the pacified districts of the Philippines he continued to govern after the close of hostilities, "from the necessities of the case,"[1] until Congress acted. The English Parliament has gradually encroached upon the prerogatives of the crown until but few residuary powers remain. In America we were supposed to have started out with an Executive with carefully defined powers, but we are now developing one with prerogatives which must be the envy of crowned heads.

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[1] Dooley *vs.* U. S., 182 U. S., 222 *et seq.*

CHAPTER IV

I. THE POLITICAL STATUS OF, AND CIVIL RIGHTS IN, OUR INSULAR POSSESSIONS

THE treaty of Paris (1898) stipulated that the "civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." There is here no promise of United States citizenship, much less of incorporation as states. The Administration proceeded on the assumption that "Congress in legislating for territories outside of the boundaries of the several states of the Union is not bound by the limitations imposed by the Constitution,"[1] and that until Congress should act the Executive had practically plenary power in governing such territories.

As a matter of course the islands were treated as foreign during the continuance of the war, and duties were collected on goods coming from them into the United States. But after the proclamation of peace the same policy was still pursued. In the case of De Lima *vs.* Bidwell[2] the Supreme Court held that duties so collected were unlawfully exacted, since by the establishment of the permanent sovereignty and jurisdiction of the United States over Porto Rico, the latter ceased to be "foreign" territory, so that no duties could be levied under the Dingley Act. Four justices dissented on the ground that territory was foreign so far as related to customs until Congress made it domestic by extending the customs laws. Louisiana and Tampico were cited as precedents, the absence of law being taken as the ground of the decision in regard to the latter in Fleming *vs.* Page.

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[1] Magoon, 120.

[2] 182 U. S.

It naturally followed that the same majority should declare, in Dooley *vs.* United States,[1] that duties collected by the President and his military government in Porto Rico after April 11, 1899, upon goods coming from the United States, were unlawfully exacted. But they held that similar duties collected before the treaty of peace were lawfully exacted. Also, that the military government was rightfully continued after the treaty.

On May 1, 1900, the act of April 12, commonly called the Foraker Act, which levied duties upon goods passing between Porto Rico and the United States, became operative. This act a majority of the Court, consisting of Mr. Justice Brown and the four dissenting justices in the De Lima case, held to be constitutional.[2] Mr. Justice Brown had sided with the majority in the De Lima case in saying that Porto Rico ceased to be foreign territory with the treaty of cession. He now held that Congress, in dealing with such parts of the United States as have not been erected into states, are not trammeled by the limitations of the Constitution, except such as go to the root of their power to act at all. The requirement that "all duties, imposts and excises shall be uniform throughout the United States" applied, in his opinion, only to the States. The other four judges, however, based their decision on the contention that new territory can be incorporated into the Union, a union of States and Territories, neither by conquest nor by treaty, but only by act of Congress. As no such action had been taken in regard to Porto Rico, it was still foreign "in a domestic sense," at least so far as related to the customs. But this principle had been repudiated and the opposite affirmed as law in the immediately-preceding De Lima case. As four of the justices practically, and the other four very strongly repudiated the position assumed by Mr. Justice Brown, the decision is not altogether satisfactory to the juristic mind.[1]

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[1] 182 U. S.

[2] Downs *vs.* Bidwell, 182 U. S., 244 *et seq.*

In the second Dooley case the Court sustained that clause of the Foraker Act which levied duties in Porto Rico on goods coming from the United States. The plaintiffs contended that this was an export tax, hence unconstitutional. But a bare majority cited the De Lima case, from which four of this majority had dissented, to show that Porto Rico was no longer foreign territory. This being true, a tax on goods carried from New York to Porto Rico could not be a tax on exports. For, as used in the Constitution, the word export referred only to foreign commerce. Chief Justice Fuller spoke for those dissenting. If Porto Rico was foreign, the case was, he declared, clear, for "no tax or duty shall be laid on articles exported from any State." Likewise if domestic, for the Court had held[2] that customs duties could be levied only on foreign commerce, while this tax purported to be a customs tax. It was, said the chief justice, a tax on exports. The idea that there was a sea change by which goods became imports on reaching Porto Rico, before they had mingled with the mass of common property, he ridiculed. As reasonably might the United States station revenue cutters off the coast to exact duties on all goods leaving the United States.

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[1] Professor John W. Burgess wittily expressed it in saying that "Mr. Justice Brown delivered the opinion of the court, eight justices dissenting."

[2] Woodruff *vs.* Parham, 8 Wall., 123.

The Fourteen Diamond Rings case was one affecting the Philippines in the same way as the De Lima case affected Porto Rico, and it was decided in the same way.[1] March 8, 1902, the Philippine Tariff Bill became a law. This requires that imports into the islands from the United States shall pay the duties laid by the Philippine Commission on like imports from all countries, and that imports into the United States from the Philippines shall pay a duty of seventy-five per cent. of the Dingley duties, less any export taxes laid by the Commission. It would seem that the De Lima case, while a particular one, as all cases are, settled principles general enough to have affected the action of the Treasury Department elsewhere than in Porto Rico, but not so, for duties were assessed on goods coming from the Philippines until the Fourteen Diamond Rings case was decided.[2] Now, of course, they are levied under the act of March 8, 1902.

It may be that we have not yet seen the end of insular cases, for the exact status of Tutuila seems as yet undetermined. Even the Administration, judged by its conduct, does not seem to be quite sure of its ground. An importer at Honolulu paid under protest duties assessed there on mats coming from Tutuila, and appealed to the Treasury Department for a ruling that his goods had come from American territory and were therefore duty-free. According to published statements, the Department at first held that, by the convention of December 2, 1899, the United States had assumed a protectorate over the island, but had not "obtained title for sovereignty,"[3] but the final decision was that such goods were not subject to duty.[4]

[1] 183 U. S., 138 *et seq.*

[2] Letter from Treasury Department to the writer, September 20, 1902.

[3] *Current History*, xii, 30.

[4] Letter from Treasury Department, Sept. 20, 1902.

The decision that we had not obtained title for sovereignty, if such a position ever was taken, does not seem to harmonize with the President's proclamation at the raising of our flag, for then it was announced that we had assumed the "sovereignty and protection" of the islands. On that occasion the sovereignty was formally ceded by the chiefs, but no action has ever been taken on this cession by either the treaty- or law-making power. The convention of 1899 contained no grant of sovereignty, but only one of the rights and claims of the other signatory powers. The third article did indeed stipulate that the three signatory powers should continue to enjoy, in respect of commerce and navigation in all the islands of the group, privileges "equal to those enjoyed by the sovereign power, in all ports which may be open to the commerce of either of them," and this evidently refers to the "sovereign power" of the United States and Germany in the islands allotted to them respectively. At best, however, this is a very shadowy title to sovereignty, and it is open to doubt whether we have any other than that which was "assumed" by the Executive in taking possession.

The situation at this writing (April, 1904) is that no law of Congress has as yet been passed to regulate the commercial relations of the American islands in Samoa. Whatever the basis of our title to the sovereignty of Tutuila, the Secretary of the Treasury considered it valid enough to justify an order, in the absence of legislation by Congress, to allow the products of, and importations into, the islands to be brought into the United States free of duty.[1] Granting that our title is good, there would have been no other course to follow in view of the law as laid down in De Lima *vs.* Bidwell. But one may be somewhat confused on learning that the Secretary of the Navy administers the customs of Tutuila[1] without regard to our revenue laws, and even collects duties on goods imported from the United States. Clearly there is a violation of the law in one department or the other. If the islands are a part of the United States, the Secretary of the Navy is acting in contravention of the law as laid down in Dooley *vs.* the United States. If not, the Secretary of the Treasury is violating our revenue laws in allowing the free importation of goods from a foreign country. By passing through Tutuila, goods from any foreign country may enter the United States without paying duties as high as those exacted in our ports, since the rates in Tutuila are considerably lower than those imposed by our revenue laws, and without paying anything whatever into the national treasury.

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[1] Letter from Treasury Department, March 3, 1904.

The situation is not much clarified when we learn, in the words of Captain Sebree, sometime governor of Tutuila, that "it has been decided that the islands are not foreign in the sense that the captain of an American man-of-war has the duties of a United States consul in regard to sailors on American merchant ships; on the other hand, that they are not domestic territory, in that our foreign consular invoices cannot be demanded or required."[2]

On the question of citizenship and civil rights the courts have not yet pronounced judgment. The treaty of peace with Spain permitted such of the inhabitants of the ceded and the relinquished territories as were natives of the Spanish peninsula to elect to retain Spanish allegiance, but it was provided that, in default of such election, they should be held "to have renounced it [Spanish allegiance] and to have adopted the nationality of the territory in which they may reside." For Spanish subjects inhabiting the territories in question who were not natives of the peninsula, no opportunity for option of Spanish allegiance was reserved, and it was obviously intended that their nationality, like that of natives of Spain who failed to make the requisite election, should follow the nationality of the territory in which they resided. It was also stipulated by the treaty of peace that "the civil rights and political status of the native inhabitants of the territories ceded" to the United States should be "determined by the Congress." In its attempt thus broadly to commit the determination of the rights and privileges of the annexed peoples to the discretion of Congress the late treaty of Paris differs from any of our previous treaties. Those who so elect are, by the treaty, given American nationality, but it is to be observed that nationality and citizenship are not always identical. Whether and how far that distinction can be maintained in the United States is at least open to debate. But, while the courts have not yet pronounced judgment on the question of citizenship and civil rights, the question of nationality has been passed upon by the court of last resort.

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[1] Letter from Treasury Department, March 3, 1904.

[2] *Independent*, Nov. 27, 1902, p. 2812.

In August, 1902, Isabella Gonzales, a native of Porto Rico, was detained at Ellis Island and, upon examination, was excluded from the United States on the ground that she was an alien likely to become a public charge. She then applied to a United States circuit judge for a writ of *habeas corpus,* but this was refused on the ground that the act of Congress declaring the inhabitants of Porto Rico to be citizens thereof and to be entitled to the protection of the United States had not naturalized them as citizens of the United States, and that they were therefore aliens and subject to the law regulating the admission of aliens.

The Secretary of the Treasury, who then administered the immigration laws, addressed the Secretary of War and called his attention to this decision in order that the necessary steps might be taken to advise the citizens of the Philippine Islands that, upon their arrival at ports of the United States, they would be "examined as aliens under the Immigration and Chinese Exclusion Laws."

In reply the Hon. Charles E. Magoon, law officer of the War Department, gave it as his opinion that, according to the decision of the Supreme Court in the Insular Cases, the geographical limits of the United States had been extended so as to include Porto Rico and the Philippines. This being true, the question in this case was not whether the inhabitants of the islands were aliens, but whether our laws respecting immigration restricted aliens lawfully residing within our geographical boundaries from passing freely from one place to another. The power to regulate the migration of aliens within our borders certainly belonged to Congress, but had it been exercised? The act of April 29, 1902, reënacted the Chinese Exclusion Laws, and at the same time so amended them as to forbid Chinese laborers, not citizens of the United States, from emigrating from the islands to the mainland of the United States. As the enforcement of these laws then belonged to the Treasury Department, the War Department was, said Judge Magoon, without jurisdiction or responsibility in the matter of the treatment accorded to such of the inhabitants as sought to leave the islands and pass to the mainland. Still it seemed proper and necessary for the War Department to cause it to be known that residents of the Philippine Islands, other than citizens of the United States, seeking to enter a port subject to the jurisdiction of the Treasury Department "will be examined as aliens under the provisions of the Immigration and Chinese

Exclusion Laws." The Supreme Court, in the Insular Cases, has held that, in the absence of Congressional legislation to the contrary, the products of our new territory were entitled to free entry in the ports of the United States. Should not a like rule apply to the inhabitants?[1] This view was sustained by the Supreme Court, which held that a native of Porto Rico, who was residing in the island at the time of cession, could not be excluded from the United States as an alien immigrant.[2]

But, while the Court decided that the petitioner was not an "alien," nothing was said upon the question of citizenship. By the act of April 12, 1900, to establish a civil government for Porto Rico, the inhabitants of the island who were Spanish subjects when the treaty of peace was proclaimed, including natives of the peninsula who failed to elect Spanish allegiance, were declared to be "citizens of Porto Rico"; while, by the act of July 1, 1902, to establish a civil government for the Philippines, the inhabitants of those islands were, under like circumstances, declared to be "citizens of the Philippine Islands." The evident intent of Congress was to exclude them from citizenship in the United States.

If the inhabitants of the islands ceded by Spain have not become citizens of the United States, it logically follows that they are not entitled to all the rights, privileges, and immunities guaranteed to such citizens by the Constitution. The Philippine act of July 1, 1902, however, while not purporting to "extend the Constitution" to the Filipinos, does assure them of the substantial benefit of the bill of rights. How far they can acquire political rights by migrating to the States remains to be seen. Since the Fourteenth Amendment provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, it is hard to see how the "citizens" of Porto Rico and the Philippines can, upon migration to the States, be denied political and civil rights any more than the citizens of New Mexico or Arizona.

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[1] Opinion rendered Nov. 6, 1902. Kindly furnished in MS. by the author.

[2] Gonzales *vs.* Williams, 24 Supreme Court Reporter, 177; decided January 4, 1904. See Magoon, *op. cit.*, 120.

ERRATA.

On page 132, footnote, read *infra,* 210.
On page 176, footnote, read *Supra,* 101 *et seq.*
On page 155, footnote, read *Supra,* 129, 131.
On page 203, footnote, read *Infra,* 238.
On page 212, footnote, read *Infra,* 225.

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VITA

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